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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 486

JOSEPH P. DUNNING, ERNEST BINGHAM, O. Q. GAINES, JOHN H. SIEVERS ET AL., INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND ON BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,
Petitioners,

vs.

THE Q. O. ORDNANCE CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OPINIONS BELOW.

The opinion of the District Court (App. A1-A16) is reported at 119 Fed. Supp. 793. The first opinion of the Court of Appeals (App. A17-A25) is reported at 228 F. 2d 929, and the opinion of the Court of Appeals on rehearing (App. A26-A32) is reported at 233 F. 2d 902.

JURISDICTION.

The judgment of the Court of Appeals on rehearing was entered on June 6, 1956. A timely petition for rehearing or for transfer to the Court *en banc* was denied on July 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251, *et seq.*), are set forth in the Appendix, *infra*, A35-A40.

QUESTION PRESENTED.

Where powder line operators and inspectors in an ordnance plant must make extensive use of chemicals in melting, pouring and processing explosives for bombs and artillery shells and were prior to 1947 compelled by indispensable and vital considerations of health and plant safety measures against the hazards of the work, and required as a term of their employment to change from skin out into powder uniforms provided by the employer and to shower at the end of the work period to remove powder from hair and skin, are these clothes-changing and showering activities amounting to 45 minutes per day an integral part of their principal duties for which they are to recover compensation therefor, under the Fair Labor Standards Act, without meeting the requirements of the Portal-to-Portal Act by proving a special contract under which they

were to be compensated for these periods or a custom or practice under which compensation was to be paid therefor?

STATEMENT.

The facts of this case are actually and practically undisputed, and contained for the most part in findings of either the district court or a finding of the Circuit Court of Appeals for the Eighth Circuit in one of its two opinions. Reference (R. .....) refers to the typewritten record.

This action was instituted by the petitioners in 1945 against the Q. O. Ordnance Corporation of Grand Island, Nebraska, to recover compensation for overtime under the Fair Labor Standards Act of 1938, as amended. Commencing in March of 1942, the United States government erected an ammunition, shell loading and bomb loading plant on a tract of land known as the Q. O. Ordnance plant on the outskirts of Grand Island, Nebraska. The plant area, comprising twenty square miles, was at all times material to this action owned by the United States as were the plant buildings and the other equipment, tools and machinery used therein. On February 27, 1942, the United States entered into an agreement with respondent, the Q. O. Ordnance Corporation, a Delaware Corporation, relating to the operation of the plant and the manufacture, production, loading, shipping and handling of cartridges, shells and bombs. There were in all three main contracts, dated February 27, 1942, July 25, 1944, and October 5, 1944. The contracts were all performed by the Q. O. Ordnance Corporation during the periods covering all of the employment periods of the respective petitioners.

The finished products of respondent were shipped in interstate commerce to points outside the State of Nebraska.

Actual production, *i. e.*, pouring explosives into the shells, did not commence until November 11, 1942. However, materials used in production were shipped into Nebraska via interstate commerce and were received and stored at the plant prior to that date (App. A3).

The respondent in carrying out the contracts employed petitioners as powder line operators and production line inspectors. Powder line operators and inspectors are claiming overtime compensation for a forty-five minute period occurring every shift as a result of changing their powder uniforms at the beginning of the shift and removing the uniforms, taking a shower and dressing into street clothes after the termination of the shift. The powder line operators were engaged in loading bombs and shells. In all, there were four bomb and shell loading lines on the plant site. Each line was approximately one mile in length and consisted of many buildings connected by ramps. At the end of each line there was a building known as a change house. Each line was surrounded by a separate fence and the powder line operators gained access through the fence at the gate house where they were searched and relieved of all hazardous objects contained on their persons. From the gate house the line operators went to the change house (App. A11).

The change house was divided into two separate units, one for the men and one for the women. Each powder line worker would enter his respective unit, take off his clothes and put them in a locker provided for that purpose. He would then proceed to another room where he received and donned his powder clothes and respirator (R. 14, 21, 22, 27, 47). The powder clothes consisted of cotton underwear, denim coveralls with rubber buttons to prevent sparking, caps or bandana handkerchiefs, and safety shoes having no nails or metal in them (App. A12). All line

workers in fifteen of the eighteen buildings on each line were required to wear these powder clothes and respirator; it was mandatory (R. 37, 38). After donning the powder uniform the workers proceeded to their place on the line. These uniforms and respirators were worn by the powder line workers to protect the plant against sparks which would cause an explosion and also to protect the workers against a toxic powder contamination which was dangerous to the lungs and skin and would cause the hair to turn red. The plant had one bad explosion during operations by respondent in which ten or twelve workers were injured or killed (R. 18). It was also mandatory that powder line workers take a shower at the end of the shift to wash off the powder adhering to their skin and hair to further prevent powder contamination (App. A20). The time spent in changing to the powder clothes prior to shift time and removing them, taking a shower, and donning street clothes after the end of the shift, amounted to 45 minutes a shift and no compensation was ever paid the powder line workers for this time (R. 21, 22, 25, 27, 38; App. A19).

The line operators were paid for eight hours and there were three around the clock shifts.

In the early days of the operation the time clock was located at the gate house and the employees clocked in there. Later the time clock was kept inside the change house for a time, but was later moved to the ramp just outside the gate house on the side nearest the lines (App. A12). The result of this changing of the time clocks was that in the early part of the operation the clothes changing and showering activities were included in the "timed-in" period, and after removal of the time clocks to the ramp, the activities in question were not included within the "timed-in" period. The latest activities in question were performed in 1945.

On the trial of the case the trial court (hearing the case without a jury) dismissed the petitioners' complaints and amendments thereto.

All of petitioners' after trial motions having been overruled, petitioners effected an appeal to the Court of Appeals for the Eighth Circuit from the judgment dismissing the complaints and the amendments thereto. Thereafter, on August 10, 1954, the Sixth Circuit rendered its opinion in *Steiner* v. *Mitchell*, 215 F. 2d 171. Upon application based upon the *Steiner* v. *Mitchell* decision, *Supra*, petitioners were permitted by the District Court for the District of Nebraska, Grand Island Division, by order of September 24, 1954, to appeal *in forma pauperis* on typewritten record from the District Court, to dispense with reproduction of the exhibits in the record and to use the original exhibits on the appeal. Thereafter on April 29, 1955, the Court of Appeals for the Eighth Circuit affirmed the District Court and simultaneously therewith certiorari was granted by the Supreme Court of the United States in botn *Steiner* v. *Mitchell* and *Mitchell* v. *King Packing Company*, 349 U. S. 914. On the basis of certiorari having been granted in those cases, the Court of Appeals for the Eighth Circuit held its opinion in this case in abeyance until the decisions of the Supreme Court on January 30, 1956, whereby *Steiner* v. *Mitchell*, 350 U. S. 247, was affirmed, and *Mitchell* v. *King Packing Company*, 350 U. S. 260, was reversed. Thereafter, on February 10, 1956, the Court of Appeals for the Eighth Circuit granted rehearing and after rehearing on June 6, 1956, entered its order reaffirming the District Court and denying petitioners any recovery on their claims. Petitioners' motion for rehearing or to transfer to the Court *en banc* was denied July 12, 1956.

On July 27, 1956, the United States Court of Appeals for the Eighth Circuit entered its order staying the is-

suance of its mandate and granting petitioners until August 27, 1956, in which to prepare and file their petition for writ of certiorari to the Supreme Court of the United States. On August 27, 1956, and on September 25, 1956, the United States Court of Appeals for the Eighth Circuit entered its orders further staying the issuance of its mandate and extending the time to October 10, 1956, for petitioners to prepare and file their petition for writ of certiorari, provided that if within that time there is filed with the Clerk of the Court of Appeals for the Eighth Circuit a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay of mandate thereby granted shall continue until final disposition of the case by the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT.

1. This decision conflicts with the ruling decisions on the subject from the Ninth Circuit, the Sixth Circuit, the Fourth Circuit and decisions of district courts located in the Third Circuit and the First Circuit. In addition thereto, it conflicts with the heretofore settled law of the Eighth Circuit.

2. The Eighth Circuit Court of Appeals, misinterpreted the Supreme Court's decision in *Steiner* v. *Mitchell* in the following regards:

> (a) In construing what the Supreme Court said as a matter of pure dicta insofar as it referred to Section 2, Portal Act cases, as a mandate for the Eighth Circuit to change what had always been their settled law as to Section 2 cases, and even though the Supreme Court carefully pointed out that it was deciding only a Section 4 Portal Act matter.

(b) In refusing to follow as a matter of *stare decisis* the finding of the Supreme Court in the *Steiner* v. *Mitchell* decision that dressing and showering activities of the nature performed by the battery workers in the *Steiner case* (*a fortiori* stronger and more compelling facts in this case) constitute activities which were an integral and indispensable part of the employees' principal activities.

(c) In failing to follow the Supreme Court's correct statement of the law as to Section 2 cases even though dicta.

3. This decision involves the claims of some 1,500 employees for compensation and damages in the neighborhood of Two Million Dollars. There is at least one other Section 2 case now pending before the Eighth Circuit involving the employees of the Cities Service Defense Corporation, and undoubtedly there are other Section 2 cases still pending in the other Federal circuits. Therefore, this is a matter involving the rights of many people and for substantial sums of money and it is as important that this law as to Section 2 of the Portal Act be settled, even as the Supreme Court has settled the law as to Section 4. This is true particularly where, as now, the courts have misinterpreted what the Supreme Court meant only to apply to Section 4 cases.

ARGUMENT.

Introduction.

This is a case of first impression in this Court. It involves the claims of some fifteen hundred workers to approximately Two Million Dollars of unpaid overtime compensation and liquidated damages. A similar case is pending on the current docket of the Court of Appeals for the Eighth Circuit, *Dutton* v. *Cities Service Defense Corp.* (former opinion 197 F. 2d 458); others are doubtlessly pending elsewhere, although statistics are not available.

The case at bar concerns the time spent in dressing, undressing and showering at a bomb-loading plant prior to 1947. These activities were required by the employer and were absolutely essential to prevent the plant from exploding and to safeguard the workers' health. They were as integral and indispensable to petitioners' performance of their duties as any activity could be. The question is whether or not Congress intended by Section 2 of the Portal to Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*) to deny compensation for such activity.

The Court of Appeals for the Eighth Circuit has heard this case twice. It has written two conflicting opinions herein, both denying petitioners' claims. In the first opinion the court reaffirmed its previous decisions to the effect that in a pre-1947 situation it was not necessary under the Portal Act to find a custom, practice or contract to pay for the time in question if the activities involved were integral to the activity the worker was hired to perform. However, relying in part on the Ninth Circuit's decision in *Mitchell* v. *King Packing Co.*, 216 F. 2d 618, the Eighth Circuit held

that in the instant case the trial court had not erred in finding that petitioners' activities were not integral and indispensable to their principal activity.

Subsequently, this Court handed down its opinions in *Steiner* v. *Mitchell*, 350 U. S. 247, and *Mitchell* v. *King Packing Co.*, 350 U. S. 260. The latter case was reversed on the very grounds the Eighth Circuit had used it for authority in deciding this case. *Steiner* and *King*, as decided by this Court, made it abundantly clear that from a factual standpoint the activities of petitioners here must be classified as an integral part of the work they were hired to do.

Petitioners therefore sought a rehearing in the Eighth Circuit in this case. We pointed out that in *King* and *Steiner* this Court had before it factual situations less compelling than the factual situation here, and had ruled that they were integral parts of the principal activity. If the *Steiner* and *King* activities were integral and indispensable, we argued, the activities here could not be said to be otherwise. Therefore, under the Eighth Circuit's rule which obviated the need for proving contract, custom or practice in such cases, petitioners were entitled to compensation.

A rehearing was granted. The second opinion also concluded that petitioners were not entitled to recover. This time, however, the Court of Appeals did not, as they could not in the light of *Steiner* and *King*, hold that petitioners' activities in suit were not integral to the principal labor. Instead, the ruling simply was that Section 2 of the Portal Act precluded recovery. Thus, without saying so, the Eighth Circuit abandoned its previously settled rule that pre-1947 activities integral to the principal labor were compensable, regardless of contract, custom or practice. To the contrary, it appears to have held that Section 2 of the Portal Act denies compensation for any pre-1947 activ-

ity, principal or incidental, unless contract, custom or practice to compensate be shown. The remarkable thing is that the authority cited for this change of attitude by the Eighth Circuit is the Court's decisions in *Steiner* and *King*, granting compensation in post-1947 instances.

We submit that the Eighth Circuit has erred. Factually, *Steiner* and *King* rule this case, and require the conclusion that the activities here were integral to—that is, a part of—the principal activity. Legally Section 2 of the Portal Act does not deny compensability in such case. In holding otherwise, the Eighth Circuit's conclusion conflicts with decisions from other Circuits and misinterprets and misapplies the decisions of this Court in *Steiner* and *King*.

I.

This Decision Conflicts with the Ruling Decisions on the Subject from the Ninth Circuit, the Sixth Circuit, the Fourth Circuit and Decisions of District Courts Located in the Third Circuit and the First Circuit. In Addition Thereto, It Conflicts with the Heretofore Settled Law of the Eighth Circuit.

The particular conflict in the opinion sought to be reviewed and the prevailing opinions of other circuits is this:

On the second hearing herein, Judge Sanborn, speaking for the Court said:

> "Section 2 of the Portal to Portal Act was intended to preclude the allowing of claims such as those in suit based as they are upon clothes changing and showering activities which took place prior to May 14, 1947 and which were not compensable under any contract or practice * * *." (irrespective of whether or not said activities are an integral part of and indispensable to the employees' principal duties) (parentheses ours).

This is diametrically opposed to what Judge Collet had said in the prior opinion and which very well summarized the holdings of the conflicting opinions. He said:

> "The basic issue * * * is whether or not the clothes changing and showering activities were part of the principal activities which these workers were employed to perform.
>
> "We need not reiterate in detail that if, as plaintiffs contend, all of these periods of time constituted an integral part of their principal duties they are entitled to recover compensation therefor without meeting the requirements of the Portal to Portal Act by proving a special contract under which they were to be compensated for these periods or a custom or practice under which compensation was made therefor."

This last statement was the law in the Eighth Circuit at the time the case at bar was tried.

The authorities followed by petitioners, cited by Judge Collet for his statement and the first of which was the basis for all of the opinions in the conflicting circuits were:

Central Missouri Telephone Co. v. *Conwell,* 170 F. 2d 641;

Martin-Nebraska Co. v. *Culkin,* 197 F. 2d 981.

It will be noted in the following discussion of the conflicting cases that the different circuits state the rule in slightly varying fashion and with slightly different reasoning arrive at the same result. For instance, one court may say if the contract of employment *requires the activity,* then the exemption of Section 2 of the Portal Act is fulfilled; another says if the activity is integral the requirements of Section 2 need not be met; still another may bring the activity within a general definition of "work performed" or "the whole service rendered was of one and the same nature" or "actual duties performed" or "actual time

devoted by them to normal work" or "the regular normal part of the employment."

All seem to agree that what Section 2 of the Portal Act was aimed at eliminating were activities newly perceived by the *Mount Clemens Pottery Case*, 328 U. S. 680, and not activities falling within the above definitions.

In *Joshua Hendy Corp.* v *Mills*, 169 F. 2d 898 (C. C. A. 9), Sept., 1948, a shipyard engineer spent one-half hour per day on what was supposed to be a lunch period, but during which he continuously attended and watched the boilers, dials and instruments. He was furnished no relief man during this period and ate at a desk from which position he could watch the boiler and make timely adjustments. His services were performed between August, 1943, and March, 1945. From a judgment in favor of the plaintiff, the defendant appealed and among its defenses the defendant contended that it was relieved from liability for the claims arising under the Fair Labor Standards Act by reason of the application of Section 2 of the Portal to Portal Act. The court, l. c. 899, after pointing out that "an express provision of a non-written contract" sufficiently satisfied the Portal Act, held that the activities during the lunch period were "work performed" within the general definition of compensable time under his collective bargaining agreement. Had the rule of the opinion under attack been applied, an opposite result would have followed.

This rule was affirmed again by the *Ninth Circuit* in *Glenn et al.* v. *Southern Cal. Edison, Ltd.*, 187 F. 2d 318, Jan., 1951. This case involved activities of a pre-1947 nature and after the passage of the Portal to Portal Act, Section 2 of that Act was pleaded as a defense by the defendant. The plaintiff employees were sub-station operators and attendants, relief operators, hydro employees and pri-

mary servicemen for a public utility. The employees worked and lived in remote places on the property of the defendant. They were required to remain on the premises 24 hours of the work day. The relief operators were required to travel from station to station and stay overnight away from their homes. The primary servicemen worked on eight-hour shifts but at the termination of the shift they were required to remain in their homes or upon telephone call in order to be available for emergency calls. The plaintiff contended they were entitled to 24-hour pay and the defendant contended that active and inactive periods were separable and that the inactive services were not compensable. The defendant, filing motion for summary judgment, defended on the grounds of the Portal to Portal Act. The district court granted the motion on the theory that the Act deprived the court of jurisdiction. The *Ninth Circuit* Court of Appeals ruled that this was not a case for summary judgment because of the conflict of facts and in the course of its opinion said:

> "It is only upon findings of fact, after a regular adversary trial, as to just what the duties of the employees were and how they were to be compensated, that a conclusion can be drawn that there was or was not an express contract covering both so-called active and inactive service; or *that the whole service rendered was of one and the same nature.*" (Emphasis ours).

It will be noted from this decision, that the court was interested in whether or not the activities, as they put it "the whole service rendered was of one and the same nature." (Citing, among other authorities, *Central Mo. Tel. Co.* v. *Conwell*).

The *Ninth Circuit* again in *Biggs et al.* v. *Joshua Hendy Corp.*, 183 F. 2d 515, June, 1950, upheld the claims of workers for lunch periods during which the employees were re-

quired to work, and during the course of the opinion, l. c. 520, ruled that the activities in question comprised "the regular normal part of the employment." In addition, the *Ninth Circuit* referred to the activities as "the same kind of work as was performed throughout the remainder of the work week."

In *F. W. Stock & Son* v. *Thompson*, 194 F. 2d 493, Feb. 7, 1952, the *Sixth Circuit* Court of Appeals decided a case in which the plaintiffs were seeking recovery for unpaid overtime pursuant to the Fair Labor Standards Act for a period of time which was allotted to them for lunch and was supposedly a free period, but during which the plaintiffs' duties and responsibilities as employees were continual so that the time they spent on the employer's premises during said lunch period constituted work time. The defendant urged as a defense Sections 2 and 9 of the Portal to Portal Act. As recited by the court, l. c. 495, when the Fair Labor Standards Act of 1938 was passed:

> "An understanding was reached between appellant and its employees that, in order to continue the operation of the mill on a twenty-four-hour day basis with the same three shifts, there would be deducted from the time of the employees during the first year of the coverage of the Act a lunch period fixed at forty minutes. A compensatory increase was made in the hourly rate of pay to the employees, 'so that their take-home pay would not be reduced.' The actual starting and quitting time for the employees remained the same; and the forty-minute lunch period reduced the work week to the exact statutory maximum. In short, these employees were merely credited with a forty-four-hour week instead of the previously credited forty-eight-hour week, although they put in the same hours of work. The change was merely a bookkeeping transaction."

(This is substantially what occurred in the case at bar. The time records of the defendant originally included the dressing and showering activities in question within a gross period exceeding eight hours but for all of which employees were given eight hours pay. Later the time clocks were moved and the "timed-in" period thereby reduced to conform to the number of hours paid. This too was merely a bookkeeping change.)

After deciding other issues, the court, l. c. 499, notes 6 and 7, held that the time in question was not consumed in preliminary practices but that the lunch period activities were "actual duties performed during working hours." Following this, the *Sixth Circuit* cited with approval the rule of the *Eighth Circuit's Central Missouri Telephone Co.* case to effect that the Portal Act "was not intended to destroy claims of workers for actual time devoted * * * to normal work."

The *Sixth Circuit* also cited and followed *Biggs* v. *Joshua Hendy Corp., Ninth Circuit, supra; Joshua Hendy Corp.* v. *Mills, Ninth Circuit, supra;* and *Michigan Window Cleaning Co.* v. *Martino, Sixth Circuit,* 173 F. 2d 466, l. c. 469.

In *U. S. Steel Co.* v. *Burkett,* Nov., 1951, 192 F. 2d 489, the *Fourth Circuit* Court of Appeals held that where foremen and assistant foremen were requested to report at least 30 minutes ahead of the hour on which the shift started in order to confer with foremen and assistants shortly to go off duty as to the progress of work and problems to be encountered and the foremen and assistants were required to spend at least 10 minutes after the end of each shift for the purpose of passing out gate slips, such activities were compensable to the extent of 40 minutes per day and were not barred by Section 2 of the Portal to Portal Act. In so ruling the *Fourth Circuit* had this to say, l. c. 491:

"As was well said by Judge Rifkind in *Galvin* v. *National Biscuit Co.*, D. C., 82 F. Supp. 535, 537: 'Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U. S. C. A., Par. 201, *et seq.* A contract may not validly dictate that eight hours work shall be calculated as seven hours.' "

The *Fourth Circuit* cited with approval *Joshua Hendy* v. *Mills, Ninth Circuit, supra; Smith* v. *Cleveland Pneumatic Tool Co., Sixth Circuit,* 173 F. 2d 755; *Michigan Window Cleaning Co.* v. *Martino, Sixth Circuit, supra,* and quoted at length from *Central Missouri Telephone Co.* v. *Conwell, Eighth Circuit, supra.* The decision in favor of the worker was based on the fact that his "work and labor performed was in the regular line of duty and under the regular contract of employment."

District Court cases from the circuits indicated hold precisely the same way. For instance, *Campbell et al.* v. *Jones & Laughlin Steel Corp.*, 96 F. Supp. 189, Dist. Ct. of Pa. (located within the *Third Circuit*) involved standby guard activity during a strike and concerning which the court said, l. c. 192:

"(1) It is the opinion of this court that these facts establish a non-written contract which expressly provided for the compensation of the guards on a twenty-four hour basis. It is established by the Captain's proposition agreed to by the committee and consummated by the substantial performance of the plaintiffs. The defendant acted upon it by paying plaintiffs 'around the clock' for two days. Therefore, plaintiffs' eating and sleeping time or off time in the plans of the defendant if regarded as an 'activity,' was compensible by an express provision of a contract within the meaning of Section 2 (a)(1) of the Portal to Portal Act. For this reason the first contention of the defendant for relief must be rejected."

(As heretofore pointed out, this is what substantially occurred in the case at bar. Originally under their employment agreement, all of petitioners' activities were lumped together including the particular activities in question. They worked under that agreement for several months until the time-clocks were moved. Thereafter they continued to perform exactly the same services and activities throughout each and every day. The employer's attempt to modify the agreement was as ineffective as the effort in the *Campbell* case.)

In *Marchant* v. *Sands Taylor & Wood Co.*, 75 Fed. Supp. 783, Dist. Ct. of Mass. (located within the *First Circuit*), it was held that the plaintiff's activities in checking lights, doors, windows and sprinkler system after other employees had left and checking the warehouse, firing the stoker and removing clinkers on Saturdays and Sundays was entitled to recovery of overtime "where *required under contract of his employment* and the employer was not relieved by Section 2 of the Portal to Portal Act." (l. c. 787).

(The petitioners, in the case at bar, as the *Eighth Circuit* found "were required to change their clothes and take a shower after the shift * * * were required to change their clothes as a safety precaution against explosion which might be caused from metallic objects on or in conventional clothing * * *. They were required to take a shower as a safety measure for the employee's own health to avoid after-effects of powder remaining on the person of the employee." (App. A20).

The conflict must now be evident. Had the rule of the opinion under attack been applied, there would have been no recovery in any of the above cases because there was no written contract or custom proven which specifically made compensable the precise activity under consideration.

The activities of the petitioners, on the other hand, were the specific subject of their non-written contract of employment, required by that employment agreement; the District Court and the Eighth Circuit Court of Appeals so found. So whether one says integral parts of an employee's principal duties are not eliminated by Section 2, or whether he says that proof that the contract of employment required that activity brings the activity within the "express provision of a non-written contract" exemption of Section 2, the result is the same. The activity is covered by the Fair Labor Standards Act and not affected by the Portal to Portal Act.

II.

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell in the Following Regards: (a) in Construing What the Supreme Court Said As a Matter of Pure Dicta Insofar As It Referred to Section 2 Portal Act Cases, As a Mandate for the Eighth Circuit to Change What Had Always Been Their Settled Law As to Section 2 Cases, and Even Though the Supreme Court Carefully Pointed Out That It Was Deciding Only a Section 4 Portal Act Matter.

A review of what has been said under the first section of this argument discloses that from 1948 (when the *Central Missouri Telephone* case was decided) to the date of the opinion under attack, June 6, 1956, the basic law as to Section 2 cases in the Eighth Circuit remained settled and unchanged. That rule was:

> "If the plaintiffs' activities constituted an integral part of their principal duties, they were entitled to recover compensation therefor without meeting the requirements of the Portal to Portal Act by proving a special contract * * * or a custom or practice * * *."

As a matter of fact, the *Central Missouri Telephone* case was the cornerstone decision for all of the circuits mentioned in Section 1 of this Argument. In addition, this Supreme Court had at least tacitly approved the rule, by denying certiorari (344 U. S. 866) and denying a rehearing of that denial (344 U. S. 888) both petitions aimed at the Eighth Circuit's reaffirmance of that rule in *Martin Nebr. Co. v. Culkin*, 197 F. 2d 981.

The Supreme Court as carefully as it could reminded those reading the *Steiner* and *King* decisions:

> "We are not therefore concerned with the provisions of Section 2, which is not applicable to actions relating to activities of the employees performed after May 14, 1947."

The Eighth Circuit did not overlook this warning because Judge Sanborn quoted that part of the *Steiner* opinion. However, he also quoted some dicta remarks the Supreme Court made in regard to Section 2 claims. In addition, he omitted any reference to either the Eighth Circuit's *Central Missouri Telephone* or the *Culkin* decisions (or for that matter any Section 2 decision), although they had been extensively argued.

It is safe to assume therefore that the instant opinion was predicated not upon authoritative cases but upon the dicta remarks in the *Steiner* case. We are certain that this court never intended that the *Steiner* opinion be thus misused.

It is probable that the Supreme Court might have rephrased some of their dicta remarks in a different manner had it actually been deciding a Section 2 case. As it was, Section 2 was not involved; there was no Section 2 advocate present presenting the pro and con considerations of such a case; and the matter had been brought before the court at

the solicitation of the Department of Labor confessedly interested primarily in the administration of the law under Section 4 of the Portal Act.[1]

We believe that if the same arguments had been made to this court in a Section 2 case that compelled the Eighth Circuit to render its early decisions as far back as 1948, this court would have drawn the line precisely where the Eighth Circuit, the Fourth, the Sixth, the Ninth, the First and the Third had always drawn it as between compensable and non-compensable activities of a pre-1947 nature.

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[1]In issuing its policy statements and interpretative bulletins concerning the effect of the Portal to Portal Act of 1947 on the Fair Labor Standards Act of 1938, the administrator of the wage and hour division made the following introductory statements:

> "Many of the provisions of the Portal Act do not apply to claims of liabilities arising out of activities engaged after the enactment of the act. These provisions are not discussed at length herein because the *primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act with which the administration of the wage and hour division is charged under law.*
>
> The discussion of the Portal Act in this part is, therefore, directed principally to those provisions that have to do with application of the Fair Labor Standards Act on or after May 14, 1947.
>
> (c) The correctness of the interpretation of the Portal Act, like the correctness of the interpretation of the Fair Labor Standards Act can be determined finally and authoritatively only by the courts."

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (b) in Refusing to Follow As a Matter of Stare Decisis the Finding of the Supreme Court in the Steiner v. Mitchell Decision That Dressing and Showering Activities of the Nature Performed by the Battery Workers in the Steiner Case (a Fortiori Stronger and More Compelling Facts in This Case) Constitute Activities Which Were an Integral and Indispensable Part of the Employees' Principal Activities.

Had the Eighth Circuit followed the finding of the Supreme Court in the *Steiner* v. *Mitchell* decision to the effect that the clothes changing and showering activities of battery workers, because of the hazards of the industry and the threat to the health of the employees, constituted an integral and indispensable part of the employee's principal activities and applied that finding to the set of facts in the case at bar, the Court could have done nothing else than to have followed their own settled law and rendered judgment in favor of the petitioners. The Eighth Circuit apparently felt that it was not compelled to follow the Supreme Court's finding on a comparable set of facts. As a matter of fact it said: "The Steiner and King Packing Company cases do not compel or justify a different decision * * *." That is what the *Ninth Circuit Court of Appeals* had said in the *King Packing Company* decision, and this Court reversed that case outright on its factual finding and on a much more questionable set of facts. However, Judge Collet had recited in his former opinion "The factual situation in *Steiner* v. *Mitchell* appears to be similar in many respects to the facts here." In addition to that statement, the *Eighth Circuit* had found that the employees "were required to change their clothes as a safety precaution against explosions which might be caused from sparks from the metallic objects on or in conventional clothing."

In this regard the case at bar factually was a much stronger case than the findings in the *Steiner* case. In the latter case there was no evidence that the battery acid might explode destroying the plant or killing or maiming the employees.

In view of the above, if the findings of Superior Courts on comparable facts have any significance, petitioners' activities would of necessity have to be ruled integral and indispensable to their principal duties.

The Eighth Circuit Court of Appeals Misinterpreted the Supreme Court's Decision in Steiner v. Mitchell: (c) in Failing to Follow the Supreme Court's Correct Statement of the Law As to Section 2 Cases Even Though Dicta.

Despite the absence of parties interested in Section 2, the Supreme Court in the *Steiner* decision made what we believe is a correct statement of the law when it said:

> "On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities." (Pages 255-256 of 350 U. S.).

This is an accurate and sound statement of the law and it should be noted that Justice Warren was talking about pre-1947 cases when he made the statement. It can scarcely then be argued that his remarks related only to Section 4 cases. However, this statement, which is a correct statement of the law, was misinterpreted by the Eighth Circuit and the last phrase thereof deemed to refer only to Section 4 claims. This is an illogical conclusion which we cannot justify.

III.

This Decision Involves the Claims of Some 1,500 Employees for Compensation and Damages in the Neighborhood of Two Million Dollars. There Is at Least One Other Section 2 Case Now Pending Before the Eighth Circuit Involving the Employees of the Cities Service Defense Corporation, and Undoubtedly, There Are Other Section 2 Cases Still Pending in the Other Federal Circuits. Therefore, This Is a Matter Involving the Rights of Many People and for Substantial Sums of Money and It Is As Important That This Law As to Section 2 of the Portal Act Be Settled, Even As the Supreme Court Has Settled the Law As to Section 4. This Is True Particularly Where, As Now, the Courts Have Misinterpreted What the Supreme Court Meant Only to Apply to Section 4 Cases.

This section of the argument needs little elaboration. We have attempted to determine for the court exactly how many other cases are pending of a Section 2 nature, but, apparently, this information is not compiled. It would be impelling that this court review this matter if this case stood alone, for it is a large case involving many workers. It is more impelling that a very definite conflict now exists between this case and the opinions of more than half of the Circuit Court of Appeals. But, the fact that a decision of this court has been misinterpreted and misused for the purpose of upsetting basic and settled law made at a time when the question was of great national importance makes it practically mandatory that the court review and settle once and for all the law as to Section 2 claims under the Fair Labor Standards Act as affected by the Portal to Portal Act.

CONCLUSION.

Now that the court has clarified for the purpose of the Department of Labor the effect that Section 4 of the Portal to Portal Act had upon the Fair Labor Standards Act for the purpose of a smoother administration of the provisions of the Fair Labor Standards Act, it is just as important that the court clarify the law that relates to Section 2 of the Portal to Portal Act, and the many pending claims under the Fair Labor Standards Act. We are confident that if the court considers the precise problem at hand, after a full presentation by both sides they will agree with the prior conclusions of the Eighth Circuit and the Courts of the five other Circuits, and the law hereafter as to the effect of the Portal to Portal Act on both types of claims will be set at rest.

Petitioners respectfully request that this Court issue a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review this case.

Respectfully submitted,

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CHARLES W. HESS,
Of Counsel.

APPENDIX A.

OPINION OF DISTRICT COURT OF NEBRASKA.

CIEMNOCZOLOWSKI et al.

v.

Q. O. ORDNANCE CORP.
DUNNING et al.

v.

Q. O. ORDNANCE CORP.

Civ. A. Nos. 111, 133.

United States District Court, D. Nebraska, Grand Island Division.

March 24, 1954.

DONOHOE, Chief Judge.

These actions were instituted by plaintiffs against the Q. O. Ordnance Corporation of Grand Island to recover statutory compensation under the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. A., § 201 *et seq.* Since there were many common questions of law and fact, the cases were consolidated for trial. Rule 42(a), Fed. Rules of Civ. Proc., 28 U. S. C. A. Case No. 111 was instituted by Frank A. Ciemnoczolowski on behalf of himself and all guards, guard matrons and firemen similarly situated. Case No. 133 was instituted by Joseph Dunning on behalf of himself and all line production workers, line inspectors, safety inspectors and area maintenance workers similarly situated. The defendant moved to dismiss these actions with respect to all plaintiffs not named in the caption of the complaints because as to them the actions were not "commenced" within the time limitations

placed upon such actions by the Portal to Portal Act.[1] An action is "commenced" with respect to any plaintiff if within the time allowed (1) the person is specifically named as a party plaintiff, or (2) his written consent to become a party plaintiff is filed in the case. The court is of the opinion that all plaintiffs were specifically named within the time allowed because their names appear on a schedule which was attached to, and by reference made a part of, the original and amended complaints. *Gibbons* v. *Equitable Life Assurance Society of United States*, 2 Cir., 1948, 173 F. 2d 337; *Culkin* v. *Glenn L. Martin Nebraska Co.*, D. C. Neb. 1951, 97 Fed. Supp. 661, affirmed 8 Cir., 197 F. 2d 981.

The case was tried to the court and after careful consideration of the legally admissible evidence adduced at the trial, the court, in keeping with Rule 52(a), Fed. Rules Civ. Proc., 28 U. S. C. A., makes the following special

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[1]29 U. S. C. A., § 255. Statute of Limitations.

"Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

* * * * * * *

"(b) if the cause of action accrued prior to May 14, 1947—may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every such action shall be forever barred unless commenced within the shorter of such two periods;

"(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) if it is commenced within one hundred and twenty days after May 14, 1947, unless at the time commenced it is barred by an applicable State statute of limitations."

Findings of Fact.

In the spring of 1942, the United States erected the Cornhusker bomb and shell loading plant on the outskirts of Grand Island, Nebraska. The plant area, comprising some twenty square miles, and the buildings thereon, were at all times material to this action owned by the United States. On February 27, 1942, the United States entered into an agreement with the defendant, the Q. O. Ordnance Corporation, a Delaware Corporation, relating to the operation of the Cornhusker plant. Pursuant to this[2] and two additional agreements[3] the Ordnance Corporation undertook operation of the plant and bombs and shells were loaded on a twenty-four hour basis for use by the United States in the conduct of World War II. The finished products were shipped in interstate commerce to points outside the state of Nebraska. Actual production, *i. e.* pouring explosives into shells, did not commence until November 11, 1942. However, materials used in production, were shipped into Nebraska, via interstate commerce, and were received and stored at the Cornhusker plant prior to that date.

The defendant, in carrying out the contracts employed the plaintiffs herein as guards (including matrons), firemen, line operators, production inspectors, safety inspectors and area maintenance men.

1. Guards.

From the time the first guards were hired on March 21, 1942, until May 10, 1942, the guards were paid on an

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[2]Government Contract No. W-ORD-601.

[3]Government Contracts Nos. W-05-016-Eng-240 (July 25, 1944) and W-05-016-251 (Oct. 5, 1944).

eight hours per day basis. Three or four guards began their duties on March 21, 1942, guarding a warehouse in the Safeway Building in Grand Island, Nebraska. Guards were later placed on duty at defendant's office in Grand Island. In April, when construction of the Cornhusker Ordnance Plant commenced approximately five miles from Grand Island, guards were assigned duty there. During the week beginning April 9, 1942, classes for some of the guards were commenced in Grand Island. The guards attending them were paid eight hours' time per day unless their time cards showed otherwise. Until May 3, 1942, each guard reported directly to his post at the start of his shift. From May 3, 1942, until May 10, 1942, the guards, except those attending classes, were required to report to the Safeway Building in Grand Island for roll call and assignment to posts at the start of each shift. They then went to their posts in time for the shift start. The shifts were eight hours and began at 7:00 a. m., 3:00 p. m., and 11.00 p. m. During the period from March 21, 1942, until May 10, 1942, the guards had no uniforms, carried no arms and did not punch a time clock. Each guard kept his own time on forms provided by the defendant; and the guards turned these forms in each Saturday. No guard turned in time for, nor was any guard paid for, reporting for roll call and assignment prior to going to his post at the start of the shift during the week of May 3 to May 10, 1942.

On or about May 10, 1942, time allowance was increased from 8 to 8½ hours per shift, and the shifts were changed to the following:

Shift No. 1—10:30 p. m. to 7:00 a. m.
Shift No. 2— 6:30 a. m. to 3:00 p. m.
Shift No. 3— 2:30 p. m. to 11:00 p. m.

From May 10, 1942, until October 31, 1942, the guards were paid on the basis of 8½ hours per shift. From May 10,

1942, to May 31, 1942, the guards reported to the Safeway Building in Grand Island at the beginning of the shift for roll call and assignment and then proceeded to their posts. On May 31, 1942, a temporary guard headquarters, which contained a time clock, was established in an abandoned farm house on the edge of the plant area. Thereupon all guards working in the plant area were required to clock in at temporary guard headquarters at the start of the shift, instead of reporting to the Safeway Building in Grand Island. Upon being relieved, those on posts in the plant area were required to return to guard headquarters to clock out. On September 26, 1942, permanent headquarters were established in the permanent guard building on the plant area grounds and the temporary headquarters were abandoned.

From October 31, 1942, until the end of operation of the Cornhusker Ordnance Plant by the defendant, the guards were paid on a basis of 8¾ hours per shift. The additional time allowance was made effective by changing the regular shift schedule to the following October 31, 1942:

Shift No. 1—11:30 p. m. to 8:15 a. m.
Shift No. 2— 7:30 a. m. to 4:15 p. m.
Shift No. 3— 3:30 p. m. to 12:15 a. m.

These shifts were continued until November 28, 1942, when they were changed to the following:

Shift No. 1—10:15 p. m. to 7:00 a. m.
Shift No. 2— 6:15 a. m. to 3:00 p. m.
Shift No. 3— 2:15 p. m. to 11:00 p. m.

Pursuant to this change, the guard mount was to be held at 10:15 p. m., 6:15 a. m., and 2:15 p. m., and the clock was to be punched not later than five minutes after the des-

ignated time of guard mount. After September 29, 1943, guard mount was held at 10:20 p. m., 6:20 a. m., and 2:20 p. m., and the clock could be punched not later than those designated hours.

On or about November 8, 1943, an order was issued to the guards that beginning November 8, 1943, all guards would be required to leave their uniforms at the plant. Lockers were provided for the guards in which the uniforms would be left when the guards were not on duty and where usual wearing apparel would be kept when the guards were on duty. This altered the previous practice of allowing the guards to wear their uniforms home or leave them at the plant as they saw fit.

It was usual for the guards to enter the main gate, go to their lockers and change clothes and clock in prior to the start of their shift. After clocking in the guards would proceed to guard mount which included roll call, inspection, instructions and orders for the day. From guard mount the guards would proceed by their own or company transportation to their posts. All the activities engaged in by the employees, prior to the time they reached their posts were preliminary activities and were not part of the day's principal activities.

When the guards reached their posts, they were required to remain at their posts until relieved. The guards were allowed to eat their lunches at their posts but were not relieved of their duties for that purpose and the company did not take any deduction from their pay for time spent eating their lunches. The activities engaged in by the guards while they were eating their lunches were part of their principal activity and they received full compensation therefor.

At the end of the shift period the guards returned to the guard headquarters to clock out. Usually the guards were returned in ample time to check out by the end of the shift. If a delay of more than seven minutes in returning a guard to headquarters at the end of the shift occurred, the guard would make a claim to the shift captain, which claim was initialed by the chief of the guards, and additional compensation was paid. All claims made under these circumstances were allowed and paid. The guards changed their clothes, turned in their guns and clocked out at headquarters. Returning to headquarters, turning in guns, changing clothes and checking out were postliminary activitives and were not part of the guard's principal activity.

Prior to May 10, 1942, the shift periods did not overlap. The guards reported to their posts at the beginning of their shifts and left them at the end of their shifts and did not receive any compensation for preliminary and postliminary activities. From May 10, 1942, until October 31, 1942, the shift periods overlapped each other by thirty minutes. As a practical matter, this meant that there were thirty minutes during which the guards could engage in preliminary and postliminary activities and receive compensation therefor. From October 31, 1942, until operations ceased the overlap was increased to forty-five minutes so that, as a practical matter, the guards had three-fourths of an hour during which they could engage in preliminary and postliminary activities and receive compensation therefor.

The evidence fails to convince the court of a single instance in which a guard engaged in the principal activity and did not receive compensation therefor. The evidence fails to convince the court that there was any contract, custom or practice, during the period in question, to pay the guards compensation for preliminary activities en-

gaged in prior to, and postliminary activities engaged in after, the shift period.

The organization of guards consisted of a chief of guards, shift captains, sergeants, guards and matrons. One captain was in charge of each shift, *i. e.* in charge of the entire plant area during the shift period. Under the captain, there were sergeants in charge of various subdivisions of the area called "districts." One sergeant would be in charge of one district for each shift. The sergeants were supervisory personnel. They were paid by the month, and not by the hour, and in all cases received at least $200 a month.

2. Firemen.

The defendant established a fire department for use in conjunction with the operation of the ordnance plant. The organization of this department included the fire chief, assistant fire chief, captains in charge of the shifts, and the firemen. From the start of operations until the 29th of August, 1943, the firemen worked in the following three shifts:

7:00 a. m. to 3:00 p. m.
3:00 p. m. to 11:00 p. m.
11:00 p. m. to 7:00 a. m.

with the exception of a few weeks during which the shifts were:

8:00 a. m. to 4:00 p. m.
4:00 p. m. to 12:00 Midnight
12:00 Midnight to 8:00 a. m.

The firemen engaged in certain preliminary activities such as traveling from the gate to their headquarters, clocking in and changing their clothes. In some instances

these preliminary activities were engaged in prior to the beginning of the shift period and the firemen did not receive compensation therefor. However, the evidence fails to convince the court that there was any contract, custom or practice to pay the firemen for their preliminary activities which occurred prior to the start of the shift.

During the eight-hour shift period the firemen engaged in their principal activity and they were not completely relieved of their duties for lunch. However, the company did not make any deduction for the time actually spent by the firemen while eating their lunch. The evidence does not convince the court that there were any instances in which a fireman engaged in the principal activity of the day and did not receive full and adequate compensation therefor.

While the firemen were working three shifts, they engaged in certain postliminary activities, such as clocking out, changing clothes and traveling from headquarters to the main gate. They did not receive any compensation for these activities if they occurred after the shift period. However, the evidence fails to convince the court that there was any contract, custom or practice to pay the firemen for their postliminary activities which occurred after the end of the shift period.

On August 29, 1943, the defendant company established the two-platoon system for the firemen at the plant. Under this system the firemen were required to be on duty for twenty-four hours and then they would be off duty for twenty-four hours. The firemen were paid for only sixteen hours of the twenty-four that they were on duty. Each fireman was allowed an eight-hour sleeping period.

In some instances a fireman might be required to stand watch on the floor or at the PBX switchboard, for

periods varying from two to three hours duration during the eight-hour period denominated sleeping time. When these watch periods occurred during sleeping time the firemen were allowed a rest period, prior to midnight, which was equal in hours to the sleeping time actually spent on watch.

On rare occasions the firemen were called to duty from their sleep because of an emergency arising during the sleeping period. In these instances they were paid one and one-half times the regular hourly rate for the time actually worked. During the entire operations of the defendant company when the two-platoon system was in force, there was a total of sleeping time hours of 6,360, only 11.9 hours of which were spent in taking care of emergency calls.

The company furnished the firemen a recreation room, a dining room, a kitchen fully equipped, and a sleeping dormitory equipped with beds, sheets and blankets. The first eight hours of the twenty-four hour shift was considered work time, the next eight was considered recreation time during which the firemen were on call but were free to play games, listen to the radio and otherwise amuse themselves. The firemen were allowed to, and did, prepare and consume their meals on the company's time. They were allowed to, and did sometimes, retire prior to the end of the first sixteen hours, *i. e.* prior to midnight.

The evidence fails to convince the court of a single instance occurring while the firemen were on the two-platoon system in which a fireman engaged in the principal activity and did not receive compensation therefor. Although in some instances during this period the firemen may have engaged in preliminary or postliminary activities without compensation, the evidence fails to convince the court that there was in existence any contract, custom or

practice to pay for these preliminary and postliminary activities.

The establishment of the two-platoon system by the defendant was in good faith, in conformity with, and in reliance upon the approval of the deputy administrator of the Wage and Hour Division of the United States Department of Labor.

The firemen and the guards received full compensation at the regular rates of pay for all periods of drill and pistol practice.

3. Line Operators.

The line operators were engaged in loading bombs and shells. In all, there were four bomb and shell loading lines on the plant site. Each line was approximately one mile in length and consisted of many buildings connected by ramps. At the end of each line there was a building known as a change house. The lines were surrounded by fences and the employees gained access through the fence at the gate house where they were searched and relieved of all hazardous objects contained on their persons. In the earliest days of operation the time clock was located at the gate house and the employees clocked in there. From the gate house the line operators went to the change house. In the basement of each change house there was a cafeteria and the employees could leave their lunch pails, if they had any with them, in the cafeteria.

The change house was divided into two separate units; one for the men and one for the women. Each employee would enter his respective unit, take off his clothes and put them in a locker provided for that purpose. He would then proceed to another room in which he had a different locker containing his powder clothes. He would put on his powder

clothes, consisting of underwear, overalls, stockings, safety shoes and some type of hair covering, and then proceed out of the change house to his respective position on the line where he performed his duties. In connection with the change house, it should be mentioned that the time clock was kept inside of the change house for a time but was later moved to the ramp just outside the gate house on the side nearest the lines.

During the shift period the line operators were allowed a forty-five minute lunch period. The employees were required to eat their lunches in the cafeteria in the change house and the company did not make any deduction for time spent by the employees for their lunch.

At the end of the shift, the line operators would return by way of the ramp to the change house, take off their powder clothes, shower when desirable,[4] put on their street clothes, proceed to the gate house, pick up their detained belongings, and then leave for their homes.

From the commencement of operations by the defendant until termination thereof the shifts ran as follows:

Shift No. 1— 8:00 a. m. to 4:00 p. m.
Shift No. 2— 4:00 p. m. to 12:00 a. m.
Shift No. 3—12:00 a. m. to 8:00 a. m.

The line operators were paid for eight hours, no deduction being made for lunch time. The time cards show that oftentimes the employees clocked in shortly before the beginning, or clocked out shortly after the end, of the shift pe-

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[4]The explosive operators, who worked in buildings in the center portion of the line where the explosives were melted, poured and processed, were required to wear powder clothes and take a shower at the end of the shift. The other line operators were not.

riod. However, the evidence fails to convince the court that the employees ever engaged in the day's principal activity without receiving compensation therefor and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before, or postliminary activities engaged in after, the shift period.

4. Line Inspectors.

What has already been said about the line operators applies equally to the line inspectors. However, the line inspectors had the additional duty of turning in reports at the end of the shift. The evidence is conflicting with respect to how much time was spent in preparing the reports and the evidence fails to convince the court that any line inspector spent any time, which can be reasonably calculated, or which was not inconsequential, in preparing and submitting such reports after the shift period.

5. Safety Inspectors.

An organization was established at the defendant's plant to deal with safety procedures. At the head of this was the chief safety engineer and under him were safety inspectors who were directly responsible to the chief safety engineer. The safety inspectors wore a special uniform with a badge and one safety inspector would keep surveillance over one line each shift. Whenever he observed a condition which violated the established safety requirements he would take it up with the foreman of the department so that the situation could be remedied. If the matter was not cleared up, the safety inspector would report to the chief safety engineer who would consult with top management in the matter.

Each safety inspector was in full charge and was not supervised by the chief safety engineer, except in a very

general way, and each safety inspector had to regularly and customarily exercise discretion and independent judgment. The safety inspectors were specially trained and did not perform non-specialized work. All of the safety inspectors received pay in excess of $200 a month.

The evidence fails to convince the court that the safety inspectors ever engaged in the day's principal activity without receiving compensation therefor; and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before, and postliminary activities engaged in after, the principal activity.

6. Area Maintenance Men.

The area maintenance men were on an eight and one-half hour shift. However, they were paid for only eight hours because they were given a one-half hour lunch period. The evidence discloses that they actually received half an hour to eat their lunch at all times. The employees were fully compensated for all principal activities in which they engaged; and there was no contract, custom or practice to pay them for preliminary and postliminary activities.

Discussion.

An employee who brings an action under the Fair Labor Standards Act for additional compensation has the burden of proving by a preponderance of the evidence that he has performed work for which he has not been properly compensated; and evidence which is too uncertain or conjectural to permit a finding that he worked some definite number of overtime hours or parts thereof, will not satisfy this burden. *Mornford* v. *Andrews*, 5 Cir., 1945, 151 F. 2d 511. Under the Fair Labor Standards Act, 29 U. S. C. A., § 201 *et seq.*, as modified by the Portal-to-Portal Pay Act, 29 U. S. C. A., § 251 *et seq.*, in order for an employee to recover in this case the court would have to be convinced

a) that the employee engaged in principal activities and was not properly compensated therefor; or

b) that the employee engaged in preliminary or postliminary activities; that he was not properly compensated therefor; and that there was in existence a contract, custom or practice to pay the employees for preliminary and postliminary activities. *Central Missouri Telephone Co.* v. *Conwell,* 8 Cir., 1948, 170 F. 2d 641; *United States Cartridge Company* v. *Powell,* 8 Cir., 1950, 185 F. 2d 67, opinion modified 8 Cir., 186 F. 2d 611; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 8 Cir., 1952, 197 F. 2d 981.

The court has carefully considered the evidence and is not convinced of a single situation in which an employee in this case engaged in principal activities without receiving compensation therefor. In this connection it should be mentioned that ordinarily the following activities are considered preliminary or postliminary and not principal: (1) walking, riding or traveling to and from the actual place of performance of the principal activities regardless of whether such activities occur before or after the employee has checked in or out; (2) checking in or out; (3) washing or taking showers; and (4) changing clothes. For an excellent discussion of the meaning of the terms "preliminary," "postliminary" and "principal," as those terms modify the term "activity" see the enlightening opinion of Judge Delehant in *McComb* v. *C. A. Swanson & Sons,* D. C. Neb., 1948, 77 Fed. Supp. 716.

Although the evidence discloses that in some situations the plaintiffs were not compensated for preliminary and postliminary activities, the evidence does not convince the court that there was in existence any contract, custom or practice to pay for such activities; consequently recovery therefor in this action must be denied. *United States Cart-*

ridge Company v. *Powell*, 8 Cir., 1950, 185 F. 2d 67; *Bonner* v. *Elizabeth Arden, Inc.*, 2 Cir., 1949, 177 F. 2d 703; *Battaglia* v. *General Motors Corporation*, 2 Cir., 1948, 169 F. 2d 254; *Lasater* v. *Hercules Powder Co.*, 6 Cir., 1948, 171 F. 2d 263.

The method of paying the firemen under the two-platoon system was perfectly appropriate and they received full compensation for all hours worked. *Central Missouri Tel. Co.* v. *Conwell*, 8 Cir., 1948, 170 F. 2d 641; *Rokey* v. *Day & Zimmerman*, 8 Cir., 1946, 157 F. 2d 734.

The safety inspectors and the sergeants of the guards were exempt from the wage-hour provisions of the Fair Labor Standards Act, 29 U. S. C. A., § 213 (a); 29 C. F. R. (1949 Ed.), §§ 541.2-541.3.

For the reasons stated, the claims of the plaintiffs should be denied. Counsel for defendant shall prepare and submit for approval the appropriate judgments to be entered in accordance with this memorandum.

OPINION OF UNITED STATES COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,186.

Frank A. Ciemnoczolowski, Ray Winfrey, Connie Merchant, Loren R. Garst, individually and as agents and representatives to maintain this action for and on behalf of all employees similarly situated,

Appellants,

vs.

The Q. O. Ordnance Corporation,

Appellee.

} Appeal from the United States District Court for the District of Nebraska.

No. 15,187.

Joseph P. Dunning, Ernest Bingham, O. Q. Gaines, John H. Sievers et al., individually and as agents and representatives to maintain this action for and on behalf of all employees similarly situated,

Appellants,

vs.

The Q. O. Ordnance Corporation,

Appellee.

} Appeal from the United States District Court for the District of Nebraska.

[April 29, 1955.]

Before SANBORN, COLLET and VAN OOSTERHOUT, Circuit Judges.

COLLET, Circuit Judge.

Two separate actions were instituted in 1945 in the United States District Court for Nebraska to recover compensation under the Fair Labor Standards Act for time allegedly devoted by plaintiffs to defendant's work and for which the plaintiffs were not compensated. The cases were consolidated. The trial was by the court without a jury. After entering detailed findings of fact the trial court entered judgment for the defendant. The principal question involved on this appeal is whether the findings supporting the judgment are clearly erroneous.

Defendant was engaged in the operation of a large Ordnance plant for the United States Government at Grand Island, Nebraska, in the production of explosives, bombs and T. N. T. for use in the prosecution of World War II. Plaintiffs were employed by defendant as guards, matrons, firemen, workmen in the production line processing explosive materials and loading bombs, called powder line operators, production inspectors, safety inspectors and area maintenance men.[1]

The guards, including matrons, are claiming compensation for time spent on defendant's premises after their guard shift was over while waiting for drill or pistol practice. For a portion of the period of employment this waiting time was 30 minutes. Later it was reduced to 15 minutes. Still later it was eliminated entirely. The trial court found that during this waiting period the guards were completely off duty, that the periods constituted "preliminary" and "postliminary" activities for which there was neither a contract nor a custom for payment under the Portal to Portal Act. 29 U. S. C. A. 251 *et seq.*

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[1]The safety inspectors and area maintenance men did not appeal.

The firemen are claiming compensation for two, three and five hour periods periodically occurring when they were required to be on duty during what they claim was their sleeping period. During the period in controversy the firemen were working on the two platoon system. That is, they were on duty for 24 hours and off duty 24 hours. The 24 hour duty period was divided into 8 hours regular duty, 8 hours recreation and 8 hours sleeping time. They were paid for the 8 hour sleeping period. They claim, as indicated, that their sleeping time was interrupted when they were required to stand watch "on the floor or at the P. B. X. switchboards" for periods varying from two to five hours. The trial court found that when that occurred, they were allowed an additional sleeping period equal to the time such sleeping periods were interrupted.

The production line operators which are referred to in Plaintiffs' brief as "Powder Line Operators," and production inspectors are claiming compensation for a forty-five minute period occurring every shift, which time was devoted to removing their clothing at the beginning of the shift and donning their working clothes, and removing their working clothes, taking a shower bath, and dressing in their street clothes at the end of the shift. The trial court found that this time was spent in "preliminary" and "postliminary" operations for which there was neither a contract nor a custom for payment under the Portal to Portal Act.

We need not reiterate in detail that if, as plaintiffs contend, all of these periods of time constituted an integral part of their principal duties they are entitled to recover compensation therefor without meeting the requirements of the Portal to Portal Act by proving a special contract under which they were to be compensated for these pe-

riods or a custom or practice under which compensation was made therefor. *Central Missouri Telephone Co.* v. *Conwell*, 170 F. 2d 641. *Martin-Nebraska Co.* v. *Culkin*, 197 F. 2d 981.

We find no justification in the record for holding clearly erroneous the trial court's findings that the guards and matrons were off duty during their waiting period and that the guards' and matrons' waiting periods were preliminary and postliminary for which there was neither a contract nor a custom under which they were to be paid.

Nor is there justification for overturning the finding that the firemen were given additional sleeping periods equalling the time their regular sleeping periods were interrupted.

We pass without unnecessary discussion of the evidence the foregoing questions to the central question of whether the trial court's finding that the powder line workers were not engaging in an integral part of their principal duties during the forty-five minute period was clearly erroneous.

As plaintiffs aptly state in their brief—"The basic issue on this point is whether or not the clothes changing and showering activities were part of the principal activities which these workers were employed to perform."

The powder line workers who engaged in melting, pouring and processing explosives were required to change their clothes and take a shower after their shift. They were required to change their clothes as a safety precaution against explosions which might be caused from sparks from metallic objects on or in conventional clothing. They were required to take a shower as a safety measure for the employee's own health to avoid after effects of powder remaining on the person of the employee.

These plaintiffs contend that because they were required for those reasons to devote this period of time to those purposes, that the time so devoted was time spent in a necessary part of their principal duties. The argument is made to the effect that since it was undisputed that they were required to do these things, they were *necessarily* an integral part of their principal duties and the trial court's finding that these activities were preliminary and postliminary must be held to be clearly erroneous as contrary to the undisputed evidence or as based on a misconception of the law. *Steiner* v. *Mitchell,* 215 F. 2d 171, is relied upon to support that position.

The factual situation in *Steiner* v. *Mitchell* appears to be similar in many respects to the facts here. In *Steiner* v. *Mitchell* the question was whether the changing of clothes, and taking a shower at the end of the working day, was a part of the employees' "principal activity." The trial court had found that these activities were so necessary to and such an integral part of the principal activity of manufacturing storage batteries as to constitute a part of the principal activity.

It appears that this finding was based to a large extent upon the fact that the activities were necessary for the protection of the health of the employees and required by the employer.

We do not understand however, that the import of *Steiner* v. *Mitchell* is that those facts would compel the conclusion that in every case where the changing of clothes was required as a protection to the health of the employees the activity was a part of the principal activity if other cogent facts were present which prevented a finding that the greater weight of the evidence established the hypothesis that the activities in question were principal activities.

It is pointed out in *Steiner* v. *Mitchell* at page 172 that the great variety of industrial conditions and various types of industries throughout the nation made it impractical for Congress to precisely define the area embraced by the statutory language "principal activity or activities." The Court then said:

> "The scope or reach of the phrase (principal activity) was left to be measured by the facts and circumstances involved in each industry."

The fact that the area embraced within the term "principal activity" was not precisely defined by Congress necessarily resulted in a relegation of the question to the courts under facts peculiar to each case, applying the general principles laid down by Congress. And while not intended to be conclusive in all cases under all circumstances, Congress indicated clearly by the 1949 Amendment to the Fair Labor Standards Act, 63 Stat. 910-11, 29 U. S. C. A., 203(o) that changing clothes and washing at the beginning or end of the workday should not in all cases be treated as compensable activity. The Amendment referred to is as follows (Par. "o," Sec. 3):

> "(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee."

The Wage and Hour Administrator interprets "principal activity" in his Interpretative Bulletin as follows (29 Code Fed. Reg., Sec. 790.8(c)):

"(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity."

The Administrator's interpretation is entitled to consideration. While not controlling, it represents an informal judgment based upon wide experience. But we are unable to agree that the fact alone that an employee cannot perform his principal activity without changing clothes or taking a bath will make those activities a part of his principal activity beyond the reach of Section 4 of the Portal to Portal Act. Section 4 of that Act (29 U. S. C. A. 254) expressly provides that (254(a) and (a) (2))

"* * * no employer shall be subject to any liability * * * under the Fair Labor Standards Act * * * on account of the failure of such employer to pay an employee * * * for or on account of any * * * (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities * * *" unless by an—"express provision of a written or nonwritten contract * * * or a custom or practice * * * they have been recognized as compensable."

If the term "principal activity" was intended to include *ipso facto*, activity necessarily incident to the princi-

pal activity there would be no possibility of applying the 1949 Amendment of the Fair Labor Standards Act quoted above to necessary preliminary activities. And the application of Sec. 254(a) (1)[2] prohibiting the inclusion of necessary preliminary and postliminary activities in compensable time for principal activities unless so recognized by contract or custom[3] would likewise be circumscribed. As stated in *Mitchell* v. *King Packing Co.*, 216 F. 2d 618, l. c. 621:

> "In our view the term 'preliminary' or 'postliminary' cannot be interpreted so as to exclude all activity 'indispensable to the performance of productive work.' To do so would deny effect to the intended meaning of the Portal to Portal Act. All of the activities designated as 'preliminary' by the Supreme Court in the *Mt. Clemens* case can be considered indispensable." See *McComb* v. *C. A. Swanson & Sons*, D. C. D. Neb., 1948, 77 F. Supp. 716, 733.

We must conclude that the necessity of an activity to the performance of the principal activity will not alone make the former a part of the principal activity.

Whether a preliminary or postliminary activity, necessary to the performance of the "principal activity" is an integral part of the principal activity is a question of fact

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[2]29 U. S. C. A. 254. (a) "* * * no employer shall be subject to any liability * * * under the Fair Labor Standards Act * * * on account of the failure * * * to pay an employee * * * for or on account of * * * (1) walking, riding, or traveling to and from the actual place of performance of the principal activity * * * which such employee is employed to perform * * *."

[3]U. S. C. A. 254(2) (c) "For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable."

to be determined from all the relevant evidence. That a finding of fact will not be disturbed unless clearly erroneous is axiomatic.

This court held certain activities to be a part of the regular duties or principal activities of the employee in *Central Missouri Telephone Co.* v. *Conwell*, 170 F. 2d 641, and again in *Glenn L. Martin-Nebraska Co.* v. *Culkin*, 197 F. 2d 981. But the facts in those cases distinguish them from this case. We find no justification in the record for disturbing the trial court's findings that the time devoted to changing clothes and taking a shower bath were preliminary and postliminary, and that no contract or custom or practice to pay for such time had been shown.

The further point is made that the finding of the trial court to the effect that Sergeants of the Guard did not devote as much as twenty percent of their time to the same duties as other guards was clearly erroneous. The finding was made incident to the claim of the Sergeants that they were not properly classified as executive personnel under Section 13(a) (1) of the Fair Labor Standards Act, 29 U. S. C. A. 213 (a) (1).

One of the requirements for classification as executive personnel promulgated by the Administrator is that the employee to be so classified shall not devote more than 20 percent of his hours worked to the performance of non-executive duties. 29 U. S. C. A., Appendix Rules and Regulations, Part 541. The record amply supports the findings. There is no merit in this contention.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

OPINION OF UNITED STATES COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

No. 15,187.

Joseph P. Dunning, Ernest Bingham, O. Q. Gaines, John H. Sievers et al., individually and as agents and representatives to maintain this action for and on behalf of all employees similarly situated,

Appellants,

vs.

The Q. O. Ordnance Corporation,
Appellee.

} Appeal from the United State District Court for the District of Nebraska.

[June 6, 1956.]

Before SANBORN, WOODROUGH and VOGEL, Circuit Judges.

SANBORN, Circuit Judge.

After the decisions by the Supreme Court in the cases of *Steiner* v. *Mitchell*, 350 U. S. 247, and *Mitchell* v. *King Packing Co.*, 350 U. S. 260, this Court granted the petition of the appellants for a rehearing of this case, for the sole purpose of considering whether the rulings of the Supreme Court in those cases required this Court to hold clearly

erroneous the determination of the District Court to the effect that the clothes-changing and showering activities of the powder line workers at the Q. O. Ordnance plant at Grand Island, Nebraska, were not compensable under the amended Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C., § 251 *et seq.* The opinion of the District Court is reported in 119 Fed. Supp. 793.

This Court, in the opinion in this case written by the late Judge Collet, 228 F. 2d 929, at pages 931-932, pointed out that—

> "The powder line workers who engaged in melting, pouring and processing explosives were required to change their clothes and take a shower after their shift. They were required to change their clothes as a safety precaution against explosions which might be caused from sparks from metallic objects on or in conventional clothing. They were required to take a shower as a safety measure for the employee's own health to avoid after effects of powder remaining on the person of the employee.
>
> "These plaintiffs [powder line workers] contend that because they were required for those reasons to devote this period of time to those purposes, that the time so devoted was time spent in a necessary part of their principal duties. The argument is made to the effect that since it was undisputed that they were required to do these things, they were *necessarily* an integral part of their principal duties and the trial court's finding that these activities were preliminary and postliminary must be held to be clearly erroneous as contrary to the undisputed evidence or as based on a misconception of the law. *Steiner* v. *Mitchell*, 6 Cir., 215 F. 2d 171, is relied upon to support that position."

We thought that *Steiner* v. *Mitchell*, 6 Cir., 215 F. 2d 171, did not compel a conclusion that the clothes-changing and

showering activities of the powder line workers were compensable as an integral part of their principal activities. We cited with approval a statement from *Mitchell* v. *King Packing Company,* 9 Cir., 216 F. 2d 618, 621. We concluded that the question whether the activities of the powder line workers in changing clothes before and after work and in showering were such integral and indispensable part of their principal activities and were therefore compensable was a question of fact for the trial court and not a question of law for this Court. There was, and is, no contention or proof that any contract or custom or practice required the appellee to pay for clothes-changing or showering time.

It must be kept in mind that the clothes-changing and showering activities for which compensation is sought by the powder line workers in this case were all rendered prior to May 14, 1947, the date of the enactment of the Portal-to-Portal Act, and that the Section of that Act with which we are concerned is Section 2, and not Section 4[1] which was

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[1]"SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, * * *.

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in, on or after the date of the enactment of this Act [May 14, 1947]—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities,

applicable to the *Steiner* and *King Packing Company* cases. Section 2, in part, provides:

"SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, * * *.

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of *any activity* of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

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which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * * * *"

61 Stat. 86, 29 U. S. C., § 254.

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer. [Italics supplied.]" 61 Stat. 85, 29 U. S. C., § 252.

The Supreme Court in the *Steiner* case (350 U. S. 247) made it clear that that case did not involve a question of back pay for time spent in any activities performed prior to May 14, 1947, and that Section 2 of the Portal-to-Portal Act was inapplicable.

In its opinion in the *Steiner* case the Supreme Court made the following statements:

"There is no question of back pay involved here because the Court limited its judgment to prospective relief. Nor is the question of changing clothes and showering under normal conditions involved because the Government concedes that these activities ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time as contemplated in the Act. It contends, however, that such activities in the circumstances of this case are an integral and indispensable part of the production of batteries, the 'principal activity' in which these employees were engaged, and are, therefore, compensable under the relevant provisions of the Act." Page 249 of 350 U. S.

"The Portal-to-Portal Act was designed primarily to meet an 'existing emergency' resulting from claims

which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.' This purpose was fulfilled by the enactment of Section 2. The trial court specifically limited the effect of this judgment to services rendered after the judgment becomes final. We are not, therefore, concerned with the provisions of Section 2, which is inapplicable to actions relating to activities of employees performed after May 14, 1947." Pages 253-254 of 350 U. S.

"On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities. Had Congress intended the result urged by petitioner, the very different provisions of Sections 2 and 4 would have been unnecessary; Section 2 could have been given prospective as well as retroactive effect." Pages 255-256 of 350 U. S.

The *King Packing Company* case (350 U. S. 360), like the *Steiner* case, did not involve any question of the right to back pay in a situation to which Section 2 of the Portal-to-Portal Act was applicable. The question in each of those cases was whether the Secretary of Labor was entitled to an injunction to enforce future compliance with the Fair Labor Standards Act as amended by Section 4 of the Portal-to-Portal Act with respect to time spent in activities which were an integral and indispensable part of the principal activity.

It seems to us that Section 2 of the Portal-to-Portal Act was intended to preclude the allowance of claims such as

those in suit, based, as they are, upon clothes-changing and showering activities which took place prior to May 14, 1947, and which were not compensable under any contract, custom or practice.

Our conclusion is that the rulings of the Supreme Court in the *Steiner* and *King Packing Company* cases do not compel or justify a different decision with respect to the powder line workers than that which was previously reached by this Court and the District Court.

The judgment appealed from is re-affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT OF UNITED STATES COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,187.

SEPTEMBER TERM, 1955.

WEDNESDAY, JUNE 6, 1956.

John P. Dunning, Ernest Bingham, O. Q. Gaines, John H. Sievers et al., individually and as agents and representatives to maintain this action for and on behalf of all employees similarly situated, Appellants,

vs.

The Q. O. Ordnance Corporation, a corporation of Grand Island, Nebraska, Appellee.

Judgment.

Appeal from the United States District Court for the District of Nebraska.

This cause came on to be heard on the record from the United States District Court for the District of Nebraska, after granting of petition of appellants for a rehearing limited to claims of production line operators and inspectors, and was argued by counsel.

On Consideration Whereof, It Is Now Here Ordered and Adjudged by this Court that the judgment of the said District Court appealed from in this cause and heretofore affirmed, be, and the same is now hereby reaffirmed.

June 6th, 1956.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Excerpt from Proceedings of Thursday, July 12, 1956.

Order Denying Petition of Appellants for Rehearing in Cause No. 15,187.

Petition of appellants for a rehearing or for consideration of this cause by the Court *en banc* has been considered by the Court having heard and considered this cause on the merits and ruled by opinion filed and judgment entered June 6, 1956, and It is Now Here Ordered that said petition be, and is by the Court hereby denied.

July 12, 1956.

APPENDIX B.

STATUTORY PROVISIONS INVOLVED.

Fair Labor Standards Act of 1938.

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

DEFINITIONS.

SEC. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell

with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall

have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.*:

SEC. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to [May 14, 1947], except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Compare:

SEC. 4.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as

amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Extract from the Fair Labor Standards Amendment of 1949.

Extract from the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*):

SEC. 3. (o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a *bona fide* collective-bargaining agreement applicable to the particular employee.

* * * * * * *

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Divi-

sion or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

OCT 29 1956

JOHN T. FEY, Cler

No. 486

In the Supreme Court of the United States

October Term, 1956

JOSEPH P. DUNNING, ERNEST BINGHAM, O. W. GAINES, JOHN H. SIEVERS, ET AL., INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND ON BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,

Petitioners,

vs.

THE Q. O. ORDNANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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October 26, 1956.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The citations to opinions of the District Court and in the Court of Appeals are set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The Lower Court in its Memorandum found as follows:

> "The line operators were paid for eight hours, no deduction being made for lunch time. The time cards show that often times the employees clocked in shortly before the beginning, or clocked out shortly after the end of the shift period. However, the evidence fails to convince the court that the employees ever engaged in the day's activity without receiving compensation therefor and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before, or postliminary activities engaged in after, the shift period.
>
> "What has already been said about the line operators applies equally to the line inspectors. However, the line inspectors had the additional duty of turning in reports at the end of the shift. The evidence is conflicting with respect to how much time was spent in preparing the reports and the evidence fails to convince the court that any line inspector spent any time, which can be reasonably calculated, or which was not inconsequential in preparing and submitting such reports after the shift period."

Were the above findings of fact by the District Court clearly erroneous within the meaning of Rule 52 of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 52) and did the Court of Appeals for the Eighth Circuit err in sustaining the findings of the Trial Court on the original appeal and upon the Petition for Rehearing?

—o—

STATUTES INVOLVED

The pertinent provisions of the Fair Labor Standards Act and the Portal to Portal Act of 1947 involved here in this case are set forth in the Petition at page 2.

STATEMENT

The statement as set forth in the Petition, commencing at page 3, is substantially correct. However, in many particulars respondent does not adopt the statement as therein set forth and makes the following statement in lieu thereof.

Originally two actions were filed against this defendant involving claims by employees under the Fair Labor Standards Act of 1938 as amended. The case at bar originally covered claims by four categories of employees, to wit:

A. Line Operators

B. Line Inspectors

The present petition covers a substantial portion of the workers in categories A and B but Petitioners refer to them as "Powder Line Workers."

C. Area Maintenance Workers.

D. Safety Inspectors.

The other case entitled, *Ciemnoczolowski, et al. v. The Q. O. Ordnance Corporation*, covered the following two categories of employees:

E. Guards

F. Firemen.

These two cases were consolidated for trial and hearings were held at Grand Island, Nebraska, and Omaha, Nebraska. Trial was to the court without a jury and the trial court found for the defendants as to all categories of employees, and judgment was entered accordingly.

The plaintiffs in both cases then appealed to the Court of Appeals for the Eighth Circuit. However, in the case at bar, two categories of employees did not appeal, to wit:

C. The Area Maintenance Workers

D. Safety Inspectors.

Thereafter, briefs were filed, arguments had, and the Court of Appeals issued its first opinion sustaining the Trial Court in all particulars as to the employees appealing.

Thereafter, petitioners filed their petition for rehearing asking that the Court of Appeals stay its mandate as to a portion of two categories of employees, to wit: A: Line Operators and B: Line Inspectors which were collectively referred to as "Powder Line Workers."

The reason given for the petition for rehearing and the request for delay was that this Court had accepted certiorari in the cases of *Steiner v. Mitchell*, 350 U. S. 247, and *Mitchell v. King Packing Co.*, 350 U. S. 260. Accordingly, the Court of Appeals, with respect to the *Ciemnoczolowski* case, issued its mandate affirming the Trial Court and said case is therefore disposed of. Since no appeal was taken by the petitioners, except as to those employees required to change clothes and bathe, which are referred to by petitioners as "Powder Line Workers," we assume that the appeals with respect to all other employees have been adjudicated and the case is now reduced to the so-called "Powder Line Workers."

To aid the Court in determining the primary questions involved, respondent has searched the typewritten record prepared by petitioners in the original appeal to the Court of Appeals and has done the same thing with respect to the supplemental record of respondent filed in the same proceeding and have included as the Appendix hereto only those portions of the testimony or resumes thereof applicable to the powder line workers. We have eliminated and deleted the analysis of the pleadings as well as testimony of the witnesses on issues not applicable to the powder line workers. For ease of reference we have denominated the excerpts from respondent's Supplemental Record as Exhibit 1, and the excerpts from the petitioners' typewritten record as Exhibit 2, and reference will be made herein to said exhibits with respect to the record in support of arguments herein made. The petitioners have set forth the District Court opinion as well as the Court of Appeals opinions in the appendix to its Petition.

We will not, in this portion of our brief, restate more of the facts than is necessary. It is our only purpose to present the facts which we believe are sustained by the record and which are in contradiction to facts alleged or asserted by petitioners but which respondent contends are not supported by the record.

The petitioners in their Petition refer several times to respirators and state that the line operators and line inspectors covered by this appeal, were required to wear same. Even the most intensive review of the record (the primary record, the petitioners' typed record (App. Ex. II) or respondent's supplemental record (App. Ex. I),

will not produce evidence to sustain such a statement of fact. The only reference to respirators in the entire record, is a brief offhand statement made by the Safety Inspector, Orville Gaines. There is no basis to state that respirators were required. None of the line operators so testified.

There is a further statement or allegation of fact by petitioners that the powder contaminated the person of the employee in that it was dangerous to the lungs and skin and would cause the hair to turn red. The only evidence on this point was the statement by the Guard Matron, Marie Toft, who did state that she saw one or two cases of the hair turning red. There was no evidence from any witness to the effect that the powder was deleterious to human life or in any way injurious or toxic. Although the Trial Court found that those who worked where the powder was prevalent were required upon completion of their shift to shower, there was no finding by the Court as to the reason therefor and there was no statement by any witness of even one case where any employee had any adverse effect from the exposure to powder. There was no evidence elicited from any of the witnesses (defendant's officials or the employees who were suing) of any physiological effect of the powder on the body. In other words, petitioners offered no evidence of the reason for the showering and failed to sustain their burden of proof in any particular.

In the petition there are statements concerning the position of the time clocks and changes thereof. It is not and never was an issue in this case that the time shown on the time cards was working time. All the time

cards show is that the employee passed a particular point at a particular time. There is no dispute that the employee was paid for eight hours a day (or all the time that he was at his work station) and was not paid for dressing and undressing activities prior to and subsequent to the actual shift.

The petitioners have failed to point out in any particulars where the findings of fact of the Trial Court were clearly erroneous. Even the most cursory examination of the record (App. Ex. I. and II.) will sustain this contention of respondent.

———o———

ARGUMENT

In our opinion, the issues in the present case are narrow and no amount of argument and analysis can expand same so as to give this Court cause or reason to take cognizance thereof.

The fundamental issue is the determination of a fact question. The application of the law is in our opinion well settled. The Trial Court's findings have not in any particular been shown to be clearly erroneous. Petitioners attempt valiantly to pose a law question by trying to enlarge the evidence and the findings of fact so by their "Procrustean" efforts fit their case within the scope of the *Steiner v. Mitchell* and *King Packing v. Mitchell* cases, supra. The Trial Court found, as a matter of fact, that the activities for which compensation is claimed in this petition were not the principal activities nor an integral part of the activities for which the plaintiffs were hired.

The Court further found as a matter of fact that there was no contract, custom or practice to pay for these activities so as to overcome the proscriptions of Section 2 of the Portal Act. (Petitioners do not dispute that there is no contract, custom or practice.) True, the Court's finding is a negative one, but in any event it is petitioners' responsibility to show that such negative findings were clearly erroneous under provisions of Rule 52 of the Federal Rules of Civil Procedure (28 U. S. C. A. Rule 52). The issues have not changed from the time the trial in this case started. The findings of the Trial Court were clearly correct. The Court of Appeals has twice held to the same effect and rightly so.

Petitioners' attempts to revise or remake the finding of facts in their briefs and arguments to the Court of Appeals have been unavailing and twice the Court of Appeals has been able to correctly perceive the true status of the record and the evidence. It is further our opinion that this Court will have no difficulty in similarly perceiving the true issue and the status of the record. If the Trial Court failed to believe some of petitioners' witnesses, that was its prerogative and is nothing of which petitioners can complain at this time. At no time have the petitioners been able to answer the challenge which respondent has continually raised. "In what particulars was the Lower Court clearly erroneous?"

On the basis of the record, the decision of the District Court was correct, there is no conflict of decisions among the Courts of Appeals and there is no important question of Federal law requiring decision by this Court.

I.

The decision below is clearly correct.

The Lower Court stated as a finding of fact as follows:

> "The line operators were paid for eight hours, no deduction being made for lunch time. The time cards show that oftentimes the employees clocked in shortly before the beginning, or clocked out shortly after the end of the shift period. However, the evidence fails to convince the court that the employees ever engaged in the day's activity without receiving compensation therefor and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before, or postliminary activities engaged in after, the shift period.
>
> "What has already been said about the line operators applies equally to the line inspectors. However, the line inspectors had the additional duty of turning in reports at the end of the shift. The evidence is conflicting with respect to how much time was spent in preparing the reports and the evidence fails to convince the court that any line inspector spent any time, which can be reasonably calculated, or which was not inconsequential, in preparing and submitting such reports after the shift period."

It is true that in some particulars the testimony of the witnesses with respect to the line operators and line inspectors, was in conflict. The resolution of such conflicts in testimony is the province of the Trial Court and the findings are adequately supported by the record.

The petitioners had the burden of proof at the trial to prove:

> (a) That the activities for which compensation is claimed were work as defined by the Fair Labor Standards Act and,

(b) That such activities were compensable by contract, custom or practice as required by the Portal to Portal Act of 1947 or

(c) That the activities were an integral part of the work performed or were a principal part thereof.

The petitioners admit that there was no contract, custom or practice to pay for the activities claimed. They premise their recovery on the proposition that the activities referred to are compensable because they constitute an integral part of that for which the petitioners were hired. Such contention in our opinion is without foundation.

The evidence clearly shows that the plaintiffs were hired to perform work on the bomb and shell loading lines, to provide munitions for the prosecution of the war. They were not hired to change clothes or to shower. Although valiant attempts have been made by the petitioners to put their case within the confines of the *Steiner* and *King Packing* decisions, same are unavailing because there is not one shred of evidence in the record which makes the case at bar comparable.

One offhand statement by the Guard Matron, Marie Toft, about the hair turning red in a few cases is a far cry from the situation of the battery workers in the *Steiner* case. The record therein showed the injurious effect of sulphuric acid and of lead poisoning to the Steiner employees, the testimony of medical and industrial experts who gave the physiological reactions of sulphuric acid fumes and lead on the body and how the same could be carried home and even prove injurious to the families of the workers, bears not one point of comparison to the case at bar.

The record adequately supports the findings of the Trial Court. The line operators and line inspectors without question, were hired for specific duties, that is, each had a station on the production line where they performed specific tasks.

There is no evidence that they were hired to change clothes or to shower. The activities for which claims are made are specifically preliminary and postliminary in character. There is no evidence whatsoever by any witness that the job could not be performed unless they were dressed in the particular clothes involved. The Trial Court found that certain categories of employees were required to shower and that these clothes were required to be worn. The evidence does not go to the extent as provided in the *King Packing* case or the *Steiner* case that the hazards or necessities of the job made these activities an integral part thereof.

The evidence clearly indicates (the petitioners so state in their brief) that the employees were hired for an eight-hour shift to fill the metal casings with explosives. They were paid in full for this eight hours and any activities performed by the plaintiffs before said eight hours shift or subsequent to said eight hours shift were not principal activities and there was no contract, custom or practice to pay for them.

II.

There is no conflict of decision between the Courts of Appeals.

Petitioners contend that the Eighth Circuit has reversed itself from its prior decisions. Even if this were

so, it would not be a ground for this Court to grant the writ. In any event, there has been no change in the position of the Eighth Circuit. Its decision in this case accords entirely with its prior rulings. In this regard the petitioners claim that the decisions of the Eighth Circuit in the Conwell and the Culkin cases is contrary to the decisions in the case at bar. This is not so.

In the case of *Conwell v. Telephone Co.* (C. A. 8, 1948), 170 F. 2d 641, the Lower Court found and the Court of Appeals for the Eighth Circuit affirmed that telephone switchboard operators were entitled to recover for sleeping time. In this case, the telephone company hired the operators to tend the switchboards. During a period of the day they performed this duty sitting in a chair in an upright position in front of the switchboard. The Company rules permitted them to continue their tending of the switchboard by reclining or lying down on a cot or bed nearby. The lower court found as a matter of fact that they were performing the same activities during the night periods as they were performing during the other parts of the day. They were still tending to the switchboard. In no particular were the activities involved preliminary to the shift, that is in getting ready, or postliminary activities, that is, doing things after they had left the switchboard. Therefore, on the facts, the *Conwell* case has no application to the case at bar which has to do with clothes changing and showering activities.

Similarly, in the *Martin-Nebraska Co. v. Culkin* case (C. A. 8, 1952), 197 F. 2d 981, the guards and firemen were hired to put on their uniforms and stand post in the plant. A period was set aside for them to go to the

cafeteria and get their lunch. The Court found as a matter of fact that while they were in the lunchroom they were still performing the same activities; that is, they were still dressed in their uniforms, and they were still watching for badge violations and other infractions of the rules by the employees while in the lunchroom. The Court, therefore, found as a matter of fact that there was no essential change in their activities. Again, this did not involve clothes changing either before or after the shift. This readily distinguishes this case from the case at bar and in no particular is the decision of the Court of Appeals any different in the instant case from the prior cases.

The *Conwell* and *Culkin* cases merely illustrate the rule with which respondent has no argument. For example, if you hire a carpenter to saw wood for eight hours a day you can not arbitrarily say that you will pay him for only seven hours. In the case of the telephone operators, they were hired to tend the switchboards for a certain period of time and the company could not arbitrarily say that during the nighttime hours they would not be paid. They still had all the duties and requirements during the night hours that they did during the daylight hours. In the case at bar on the contrary, the line operators and inspectors were hired to do things on the line and were not hired to change their clothes, and shower and the inherent characteristics of their work did not make the clothes changing an integral or principal part thereof.

The petitioners contend that there is a conflict between the decision of the Court of Appeals for the Eighth

Circuit in the instant case and other decisions of other circuits.

We do not think that this argument is well founded for two reasons. First, the decisions, if they ever were in conflict, have been resolved by the decisions of this Court in the *Steiner* and *King Packing Company* cases, supra. If these cases conflicted with prior decisions of the Eighth Circuit Court of Appeals, it would not only be their choice but it would be their duty to change.

Another of the decisions referred to by the petitioners is the case of *Joshua Hendy Corporation v. Mills*, 169 F. 2d 898. This case is similar to the *Culkin* case on the facts. The engineer had certain duties to perform, such as watching boilers, dials and other instruments. There was a period of time of one-half hour when he was permitted to eat his lunch. The evidence in the case showed that even though he was eating his lunch he was still required to perform the same duties he did during the other parts of the day. In other words, the company had arbitrarily deleted a half-hour of time without relieving him of the obligations and activities of the job. This case is clearly distinguishable from the case at bar, and did not in any way cover activities prior to the shift or subsequent to the shift.

Petitioners next cite *Glenn v. Southern California Edison Company* (C. A. 9), 187 F. 2d 318. This decision is not in conflict with the instant case. The Trial Court in the Glenn case found for the defendants on a summary judgment supported by affidavits. The Court of Appeals, after reviewing the record, stated that a decision should

not be rendered on affidavits but should only be decided after a full-fledged adversary proceeding and a complete record. The Court said it is not evident from the record to state conclusively that there was no genuine issue of fact involved. The Court found from the affidavits that there were issues of fact which would have to be resolved and remanded the case for trial. This case does not in any way support the position of petitioners.

Petitioners also refer to the case of *Biggs v. Joshua Hendy Corporation* (C. A. 9), 183 F. 2d 515. This is the same circuit and the same defendant as in the case heretofore cited involving the plaintiff, Mills. This case, like the Mills case, involved a lunch period. There was no statement in this opinion as to what activities were performed by the employees during the lunch period, but the opinion specifically distinguishes itself from the case at bar. In the opinion, the Court stated that Section 2 of the Portal Act did not apply and very clearly supports the position of respondent herein.

> "Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of § 2 of the Portal-to-Portal Act, 29 USCA, § 252, because such work is not made compensable by the express provision of a contract within the meaning of § 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek."

It would appear, therefore, that as in the *Mills* case, the plaintiffs were engaged in doing the very same work during the so-called lunch period as they had been doing during the rest of the shift.

Petitioners next cite the case of *F. W. Stock & Son v. Thompson* (C. A. 6), 194 F. 2d 493. This case is also distinguishable from the case at bar. The claim here was for compensation for activities performed during a lunch period. The facts were no different here than they were in the *Mills, Culkin* or *Conwell* cases. In fact, the action of the employer in this case had the earmarks of a subterfuge to avoid payment of wages as required by the Fair Labor Standards Act. The plant was operating on a 24-hour basis when the Fair Labor Standards Act was enacted. Because of the requirement for the payment of overtime, the plant arbitrarily set up a pay policy which deducted for a one-half-hour lunch period. However, the employees did not change their activities from what they had been doing before. Sometimes, they were permitted to eat their lunch without being called upon. At other times they would eat their lunch hurriedly and then go back to the machines. In any event, they had no freedom and the Court found as a matter of fact that they were not doing anything different during their lunch period than they had been doing during other parts of the shift. Again, we want to point out to the Court that this did not involve activities which occurred prior to the shift or subsequent to the shift.

Petitioners next cite the case of the *United States Steel v. Burkett* (C. A. 4), 192 F. 2d 489. Rather than attempt to distinguish this case by argument, we feel that

a direct quote from the findings of the Trial Court are more than illustrative of the fact that this case, like the *Conwell* and *Culkin* cases, have no application to the case at bar. The Lower Court found as a matter of fact as follows:

> "* * * There is some conflicting testimony on both of these points, but I find those facts from a preponderance of the evidence. Then I also find as facts, from what I believe is the clear evidence without any conflict, that the work which these plaintiffs did when they came on the job thirty minutes ahead of time was the same kind of work that the turn foremen did whom they were to relieve; that it was the type of work which they were employed to do, which they were expected by their superiors to do, and which was a useful, if not necessary incident to the supervisory type of work on which they spent the most of their time. Then I find that, as to the ten minutes that they were required to stay to pass out the slips, this was work which they were specifically required to do by the terms of their employment; and this, in my opinion, is shown by the testimony that when, during a certain period of time, the slips were passed out prior to the blowing of the whistle, the turn foremen were required by specific orders to stop that practice, and to pass out the slips after the whistle blew. I find that the passing out of the slips was a part of the work which they were expected to do, which they were employed to do."

These men were employed to do certain supervisory activities during a particular shift time and then were required to spend an additional forty minutes a day doing the very same things prior to the scheduled shift and after the scheduled shift. The Court rightly found that the Portal Act had no application. We call the Court's attention to the fact that the Fourth Circuit referred to its

prior decision in the case of *Seese v. Bethlehem Steel Co.*, 168 F. 2d 58, which held the Portal-to-Portal Act had no application because the activities involved were preliminary and postliminary such as changing clothes, walking to and from the place of work. The Court held that the contract in the *Burkett* case covered the very activities for which claim was made while in the *Seese* case the activities claimed were preliminary to the shift or subsequent to the shift and involved activities different from that for which employment was originally had. We feel the facts in the case at bar are much closer to those of the *Seese v. Bethlehem Steel* case than the *Burkett v. U. S. Steel* case. The issues in the *Seese* case as set forth by the Court in the opinion are as follows:

> "This is an appeal in a suit filed in behalf of one hundred or more employees of the Bethlehem Steel Company to recover overtime pay and liquidated damages under the Fair Labor Standards Act, 29 U.S.C.A., § 201 et seq. There is no allegation or contention that plaintiffs were not paid the minimum wages prescribed by the act, with time and half for overtime, if regard be had to contract, custom or practice; but recovery is asked solely on the ground that plaintiffs were required to be on the premises of defendant before and after working time for the purpose of changing clothes and walking to and from the place where the work was carried on.
>
> * * * * *
>
> "While the case was pending in the court below, Congress passed the Portal-to-Portal Act of May 14, 1947, 29 U.S.C.A. § 251 et seq., taking away the right to recover in such case, except for an activity compensable under the express provisions of a contract or by custom or practice, and depriving the Courts of the United States of jurisdiction thereof.
>
> * * * * *

"In the three portal to portal cases referred to above, the Muscoda case, the Jewell Ridge case and the Mt. Clemens Pottery case, the Supreme Court decided that the work week prescribed by the act should be construed to include preliminary and incidental activities of the employee such as walking to work on the employer's premises, changing to work clothes, etc. The effect of this construction was to give rise to a flood of claims against employers with respect to matters which up to that time had not been regarded by either employer or employee as compensable or as having any relation to the length of work week prescribed by the act."

Petitioners, throughout the entire course of the case at bar, have missed the main point involved. At the trial of the case and at both arguments before the Court of Appeals they attempted valiantly to perform the job of having their case fit within the confines of the *Conwell*, *Culkin* and later the *Steiner* and *King Packing Co.* decisions. The Trial Court and the Appeal Court, both, distinguished the case at bar from these other decisions, and rightly so.

We, therefore, respectfully submit that there is no conflict among the Courts of Appeal, and particularly no conflict in any of the cases cited by petitioners with the decision in the case at bar.

III.

The Court of Appeals for the Eighth Circuit did not misinterpret the decisions of this Court in Steiner v. Mitchell or in King Packing Co. v. Mitchell.

We first discuss the *Steiner* case. Upon reviewing the decision of the Trial Court in the *Steiner* case and the opinion of the Court of Appeals in the same case, the

findings of fact are set out with sufficient detail so as to discern the true nature of the activities at the battery plant.

The employees there were working with two substances which were extremely harmful and dangerous—lead and sulphuric acid. The Court found that it was impossible to completely control these substances. Efforts were taken to avoid the harmful results to the greatest extent possible.

The State of Tennessee had a statute which required certain precautionary activities be taken in a battery manufacturing plant. Not only could the lead poison the employee working in the plant, but it could be carried home and harm the employee's family. The record referred to testimony by industrial engineers and medical men as to the conditions in the plant and also the effect of these materials and substances on the human body. Elaborate arrangements were made to reduce these hazards and it would extend this brief to unreasonable limits to restate the facts more extensively. We briefly reiterate them to this Court to illustrate that the facts involved in the case at bar are in no way comparable. In the case at bar there is not the slightest bit of evidence to support the allegation that working with powder was in any way comparable to working with lead and sulphuric acid. The only evidence in the record that powder had an effect upon the human body was in a few cases, where the hair turned red. We earnestly submit, that if there was evidence of harmful effects to employees working in powder, the plaintiffs would have produced same at the trial. No employee was called to the stand to testify that he had in any way been harmed, no doctors were called to

give medical evidence of the actual or potential effect thereof, and no army ordnance experts were called to give their opinions. We earnestly submit that had there been such evidence, the petitioners would have very readily produced same and elicited such testimony at the trial. The defendant voluntarily produced at the trial certain officials of its company who managed the operation at Grand Island, who were called by the petitioners in their case in chief, but no evidence was elicited from them, either on direct or cross-examination, with respect to the physiological or psychological effects of working with powder. That is, there was no evidence adduced and we earnestly submit there was no such evidence to be adduced, that working with powder was in any way harmful, and in any event did not even closely proximate the fact situation in the *Steiner* case.

Petitioners attempt by specious arguments to hold that this Court in the *Steiner* opinion only construed Section 2 of the Portal Act by way of dicta. In both the *Steiner* and *King Packing* cases the Court had to do with activities subsequent to the enactment of the Portal Act. In interpreting Section 4 this Court necessarily had to refer to the entire Act and particularly Section 2. The following paragraph from the *Steiner* decision by Chief Justice Warren to which the petitioners refer, is as follows:

> "On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor

> Standards Act where (such activities are) an integral part of and indispensable to their principal activities. Had Congress intended the result urged by petitioner, the very different provisions of Sections 2 and 4 would have been unnecessary; Section 2 could have been given prospective as well as retroactive effect.
>
> "We, therefore, conclude that activities performed either before or after the regular work shift, on or off the production line, are compensable under the Portal-to-Portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a) (1)."

The above is not dicta in respondent's opinion. The employer in the *Steiner* case was contending for the Section 2 rule to apply to Section 4 activities and the Court rightfully denied him this contention and clearly set forth a distinction between the two sections. In the case at bar petitioner is attempting to reverse the procedure and get a Section 4 interpretation applied to a Section 2 case, and in this the Supreme Court should give him no comfort. This Court correctly interpreted Congress's intent when it held that Section 2 is applicable to all activities not covered by contract, custom or practice and that Section 4 was not so broad as to the activities it made noncompensable.

At page 23 of petitioners' brief the statement is made that the above-quoted portion of Chief Justice Warren's statement in the *Steiner* case was misinterpreted and misapplied by the Eighth Circuit but they do not give any reasoning or citations therefor. We have reviewed the matter carefully and cannot see the merit of this contention, and in our judgment the Eighth Cir-

cuit correctly stated the law and did not change its position in its two opinions.

IV.

There is no important question of Federal Law involved herein.

Petitioners state in Section III of their Petition at page 24, that there are other cases which involve identical issues and, therefore, the matter should be considered by this Court. They do not offer by citation or in any other manner any support for this contention and refer only to one case in which the Cities Service Defense Corporation is involved. We believe this to be the case of *Dutton v. Cities Service Defense Corporation*, C. A. 8 (1952), 197 F. 2d 458. However, a review of the reported opinion in this case does not reveal what facts are involved. This case was decided in 1952 by the Eighth Circuit on a procedural point. The Trial Court had dismissed the case on motion. The Eighth Circuit remanded the case for trial on the grounds that the complaint was sufficient to withstand such a motion. Rather than have it decided on a procedural point the Court remanded it for a full-fledged trial for a proper presentation of the facts through stipulation or deposition. There is, therefore, no evidence available to determine what the facts are in such case and in any event the petitioners have cited none other.

The mere statement of the possibility of other cases existing should not be adequate in the absence of some proof or citation or referral thereto.

Merely because petitioners allege there are numerous employees involved in this case should not be grounds

for the Supreme Court granting the Writ of Certiorari. This case was filed by the petitioners in 1945. Since that time there have been numerous cases decided by various courts involving the issues similar to the one at bar. Petitioners were given every opportunity for a complete trial without restriction. They have argued the case twice to the Circuit Court of Appeals. The issues have been examined and re-examined. Their statement that this case had been misinterpreted by the lower courts merely begs the question. It is our opinion that they have made no showing whatsoever that would compel this Court to accept this case for review. We wish further to point out to the Court that this is a Section 2, Portal Act case which covers claims existing prior to 1947. We doubt very much that there are any significant number of cases still pending which involve pre-Portal Act activities. Therefore, the need of a decision for future reference is not pertinent and we feel that the numerous decisions involving the Fair Labor Standards Act and the Portal-to-Portal Act rendered by this Court, including the *Steiner* and *King Packing Company* cases, are adequate authority for practicing attorneys and courts to follow in administering the law to the few cases, if any, which are left covering Section 2 activities.

—o—

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

G. L. DeLacy,

Leo Eisenstatt,

Counsel for Respondent.

EXHIBIT I.

The following is a copy of the testimony of witnesses applicable to the "powder line workers" taken from appellee's supplemental record from which has been deleted analysis of the pleadings and testimony of witnesses on issues not applicable to the "powder line workers."

Mrs. Marie Toft.

The plaintiffs next produced Mrs. Toft, a guard matron. Her testimony commences at page 186 of the Transcript of Evidence.

I am a resident of Grand Island, and was a guard matron at the plant. I started working in December, 1942, and was terminated when the plant closed in 1945. The workers would start coming at seven o'clock in the morning until ten minutes of eight. They came into the street side of the change house and went over to the powder side. They put on their powder clothes and then they were inspected to make sure that they had no bobby pins in their hair and not too much makeup. They gave us the things that they would need during the lunch hour such as billfolds, coin purses or cigarettes. No metal items, cigarettes, or matches were permitted. The army set up the procedure, I don't know why they required this, but it was an order. They had to make a complete change. The old shift would come off. We saw that they showered and left their powder clothes. If they were soiled they had to put them in the laundry. If they were clean enough they could wear them the next day. We gave them back their personal belongings and saw that they showered. I never saw any fights. The workers would start coming from the line for lunch about nine forty-five. I gave them their possessions and they went down to the cafeteria. This took until about two o'clock in the afternoon.

Mrs. Mary Keister.

The plaintiffs next called this witness to testify concerning the activities of the guard matrons and as an inspector on the Line. Her testimony commences at page 251 of the Transcript.

I was a line inspector from October, 1943, until June of 1944. I worked in several different rooms on the line as an inspector. In Room 2 we had to inspect shell cases and see that they were clean, and were ready to go out on the line to be filled. In Room 6 we inspected fuses to see they were the right number for a certain lot. In Room 14 we inspected for weight. This was of the completed shell. I checked in at the change house. We had to be on the line at our place of duty by 8:00 in the morning. We worked until 4:00. We had a half-hour lunch period. Usually each room went at the same time. Some rooms varied. That is, not all of the employees ate lunch at the same time. We entered the main gate and were checked through by the guard. We drove to the line where we were working and parked in the parking area. We went through the time office and were checked there. Then we went into the change house and changed into our powder suits. We wore the same powder suits as the line workers. We punched the clock and went down to the line. Prior to going to the line, we went to the line office.

At the end of the shift we left our work stations, came through a ramp toward the change house and punched the time clock. We went in, changed our clothes, had a shower, put on our street clothes, went to the line office, left our reports and went back out through the time office and went home. These were reports covering the work. From the time we entered the main gate until we clocked in would take twenty to twenty-five minutes. At the end of the shift, it took about a half hour from the time we left the work stations until we went out the main gate. I don't remember when we had to check in. This type of work occurred each week that I worked as an inspector. The other inspectors on my shift did the same work.

On cross-examination she testified as follows:

When I worked in Building 2 as an inspector there was no powder in that building. In that building we checked to see that there was nothing in the shell casings. We had a flashlight and looked inside. I wore powder clothes. The powder clothes were coveralls, a one-piece garment. We wore a bandanna. We wore safety shoes. The shoes were made so that there would be no sparks, no metal nails in the soles. We were not required to leave the shoes on the post, but I left mine. I believe the lunch period was a half hour. It might have been forty-five minutes. In Building 2 the change house was right off the ramp and the cafeteria was in the change house. Building 6 was not much farther. In Building 14 we used the cafeteria at the other end of the line. It was not much farther from a cafeteria. I don't remember how they announced the lunch time. I always took a shower at the end of the shift. I don't remember whether we were required to take a shower when we worked in Building 2. I don't remember if there was a requirement that we take a shower if we worked in Building 6. It was required when we worked in Building 14. There was no TNT or powder in Building 6. That was where the fuse was put in. In Building 14 I was checking the weight of the bombs. If a shell was found light, we would not let it go through. We sent it back and made a report on it.

FRED HATTEN

The plaintiffs next called this witness to testify concerning production inspectors. His testimony commences at page 277 of the Transcript.

I am a resident of Grand Island and I was employed by the Q. O. Ordnance. I was a line inspector on production. We parked our car in the parking lot, came in the gate, get checked by the guards. I worked on line 3 most of the time. We were not checked by the guards at the main gate. We went into the change house where

we changed our clothes. We went to the senior inspectors's office to get our orders and then punched the time clock and went down to the line. You had to be on duty when the other shift went off so you had to be there five or ten minutes early to check his reports. My work was inspection. I worked in each building on the line. There were eighteen buildings. I was there for three years. We checked the paint, the inside of the bomb, the fuses, the tail and nose threads, the loading of the bombs in the railroad cars. We weighed the bomb, took their densities, we waited until our relief inspector came on duty and then we went to the change house, took a shower, punched out, changed our clothes, left our reports at the senior inspector's office. We were required to check in fifteen minutes early. I did not get paid for the time consumed coming in on the shift. We had a thirty-minute lunch period. The other inspectors went through the same procedures. He identified other inspectors shown on the lists attached to the complaints (Exhibit 7). It would take us an hour from the time we entered the main gate until we reached our work stations. It took the same length of time at the end of the shift.

On cross-examination this witness testified as follows:

The last six months I was senior inspector. The witness then described the production procedures. The witness testified that they were required to take showers. There were inspectors at each stage of the production. We ate our lunch in the cafeteria in the basement of the change house. You could bring your lunch, or buy it. The various buildings on the line ate at different times. We had a thirty-minute lunch period.

On redirect, regulations required that we take a shower.

It was not for the line workers to say why; we did what we were told.

The line workers did exactly the same duties as the inspectors except they actually worked on the bombs and their duties and times involved in doing them were the same except they did not have to turn in reports.

On re-cross he admitted that the line workers and inspectors did do different types of work. The line workers were actually doing the work and the inspectors were checking it, but the time put in was same. The shifts started at the same time.

MAX E. MOSES.

The plaintiffs next called this witness to testify concerning the inspectors. His testimony commences at page 292.

I am a resident of Grand Island and am presently employed as the Clerk of the District Court of Hall County. I worked at the Q. O. Ordnance as a production inspector. I heard Mr. Hatten's testimony. I worked at the Q. O. Ordnance from October, 1944, until the end of World War II. The time involved in getting to the line, working, etc., was as Mr. Hatten testified. This witness identified the claimants shown in Exhibit 8. Mr. Hatten's time was spent on bombs while my time was more on shells. We made 105 Millimeter shells. The routine of getting on the line and off the line for the inspectors and the line workers was the same, except there were no reports for the line workers. In making shells, the inspectors worked closer with the line operators. My particular job was somewhat different; there was a senior inspector for the entire line and I was in charge of a particular group of ten to twelve inspectors in one room. I made all the reports for the entire group.

On cross-examination the witness testified as follows:

I worked in Building 14. It was the final assembly of the finished shell. The ammunition had already been poured into the casing. There were ten to twelve inspectors in the room. This also covered the fuse room. These inspectors under me made out no reports. They did not have to file any reports. We had a half-hour lunch period.

FERRIS DUKE.

This witness was next called by the plaintiffs and his testimony commences at page 301.

I am a resident of Mason City, Nebraska, and worked at the Q. O. Ordnance during the War. I went to work in 1942 and worked until they quit production. I heard the testimony of Mr. Hatten and Mr. Moses. I was a line operator. I agree with their testimony as to the lengths of time it took to get from one place to another and the operations you went through.

On cross-examination he testified that at one time he was classified as an explosive operator and as a munitions handler. A munitions handler as he said, worked in the igloos where they stored ammunition.

ROY C. STRAIT.

The plaintiffs next called this witness whose testimony commences at page 304.

I am a resident of Grand Island, and was employed by the Q. O. Ordnance Corporation from November 9, 1943, to February 11, 1945, as a line operator. I heard the testimony of Mr. Hatten, Moses and Duke and agree with their testimony as to what occurred. I worked in Building 10-N which was the cooling bin for the shells.

On cross-examination he stated that he worked on Line 1 during the entire time. They made 105 millimeter shells. They also had a half-hour lunch period.

CLIFFORD H. COOPER.

The plaintiffs next called this witness whose testimony commences at page 409 of the Transcript.

I am the manager of Personnel Research and Administration for the Quaker Oats Company in Chicago, Il-

linois. I was employed by the Q. O. Ordnance plant at Grand Island from April 5, 1942, until September, 1943. I was the Division Chief in charge of payroll and time keeping. This was one of the Accounting Sections or Divisions. During the time I was there the most employees we had at one time was four thousand. We set up the operation on an eight-hour shift basis around the clock. Midnight until eight in the morning; eight in the morning until four in the afternoon; and four until midnight. The employees were paid eight hours for each shift. They were given a rest period to eat their lunch. We didn't dock them for it, it was part of their shift. During the time I was at the plant, the time clocks were at the Gate House. The employees therefore punched in at the Gate House and went to the Change House. I did not know what time the employee got to the work station. If a man was entitled to over-time the Superintendent had to initial the time card. During the first six months I was there we did not operate the lines. The eight hours the employees were paid for covered anything they might have done between the beginning and starting time of the shift, that is, eight o'clock, and four o'clock. The employees were not compensated for dressing and undressing time. It is customary in an around the clock operation to pay for lunch time. If a man worked overtime thirty-seven minutes, he would be paid for half an hour. An employee would not be docked any time unless he was over eight minutes late. He would then be docked fifteen minutes. The smallest segment of time was fifteen minutes for payroll purposes. No person was paid overtime, that is, over the shift schedules, unless his time card was initialed by the foreman or superintendent.

WILLIAM T. GORTON.

This was the next witness produced by the plaintiffs. His testimony commences at page 451 of the Transcript.

I am an employee of the Quaker Oats Company in Chicago, and during the War I was connected with the Q. O. Ordnance Corporation at its plant in Grand Island. I was a Chief Inspector of Ammunitions, then Assistant General Superintendent of Operations, and finally General Superintendent of Operations. I first went to work in Grand Island in March, 1941, and was constantly at the plant. I was out on the lines constantly. At the start of operations, the time clock was in the Guard House, or the time office where the Guards inspected the personnel that came through. Then they were moved to the change house and lastly, down to the ramp, just before it entered the buildings on the line. The line inspectors worked with the line workers. At the Time or Guard Office, the employee was divested of any substance not permitted in a restricted area. When the Time Clock was in there, they punched in and signed the register; those who were carrying lunch took it to the basement cafeteria of the change house. They then went upstairs to the street clothes side, took off their clothing, crossed over to the powder clothes side and put on their powder uniforms. Anyone working in powder was required to wear a powder uniform, and it was mandatory. The Company furnished the employees with a change of underwear, socks and coveralls; it was designed to protect the body from the TNT powder. Not all employees had to wear a powder uniform but could if they wanted to. From the change house they went to their stations on the line, to the particular buildings in which they worked. They worked eight hours. They had a lunch period. There was a signal over the loud speaker system announcing the lunch period as well as the end of the shift. In some buildings on the line everybody went to lunch at the same time, and in others they staggered the lunch period. The lunch period was forty-five minutes. They ate their lunch in a cafeteria in the first floor of the change house. There were two change houses and two cafeterias on each line. This witness described the procedures of the various buildings. The operation moved from building to

building. It was not on a continuous chain but on carts that were pulled by electric engines (called donkeys), as the bombs were prepared, loaded and sealed and fused. After lunch they worked until shift change. The bomb production line was divided in half so that half the line used one change house (with its cafeteria), and the other half used the other change house. They walked from their work stations to the change house, into the powder clothes side, took off the soiled clothes, put them in a basket, walked through a foot bath around the shower room, and then into the street clothes side where they put on their street clothes and went home. The defendant laundered the powder clothing. When the clock was moved to the change house the employees clocked after they had dressed into their powder clothes and at the end of the shift before they changed into their street clothes. Then the clock was moved to the ramp just as it entered the work station buildings. This saved congestion. The employees were paid for their lunch time. Whatever time was taken in dressing and undressing and showering and moving to the line was not paid for. It could amount to forty-five minutes a day going both ways. The line inspectors were about the same. The senior inspector made out the reports. All the line inspectors had to do was to fill out the cards during the shift time and then pick them up and deposit them with the senior inspector. He had no filling out to do. That was the only report the inspector had to make.

There were no powder employees in the inert buildings and in the finished ammunition buildings. It was optional in the inert and finished ammunition buildings for the employees to wear powder clothes. They could if they wanted to. Not all employees had to wear uniforms. Munitions handlers, dunage yard laborers, carpenters, tinners, etc., did not have to wear uniforms.

On Cross-Examination he stated that the first bomb was produced on bomb line 3 on November 11, 1942. That was the first production. The witness, using Exhibit One,

and Exhibit 16, explained to the Court in detail the physical layout of the plant and the workings. He described the buildings and flow of bombs as they were being produced. He also described the powder uniforms. There were cotton underwear and denim coveralls with rubber buttons. There was no metal in any of the clothes. The safety shoes also had no nails in them. There was also a cap for the men and a bandanna for the women. The women were furnished undergarments, such as brassieres. The procedure for actually pouring TNT into the bomb casings and putting them together was explained in detail. The line workers and the production inspectors worked the eight-hour shift. During this eight-hour period they had a lunch period for which no deduction was made. The employees could not eat on the line. They could eat only in the cafeteria. They could smoke only in the cafeterias and the company furnished electric lighters for the cigarettes.

He reiterated that the first bombs were poured on November 11, 1942, when an amitol bomb was poured as a pilot job. There were fifteen of them poured, which were taken by the Army Air Force to some Proving Ground for testing.

Charles E. Kretsinger.

The defendant next called this witness to testify concerning the line workers. His testimony commences at page 657.

I am presently a resident at Mead, Nebraska, and employed by the Nebraska Ordnance Plant there. I was a line superintendent at the Q. O. Ordnance Company. He testified similarly to witness William Gorton concerning the method of production on the line, the uniforms given to the line workers and inspectors, the procedures and regulations concerning eating in the cafeterias, and the requirements concerning bathing at the end of the shift. It was his opinion that it took about thirty minutes for a

shift to come through the change house to the clock, to the work station, and the reverse process. The time on the clock did not necessarily indicate the time spent working, dressing, or changing clothes because some employees waited around before punching out, when the clocks were at the gate house. There was no Cross-Examination of Mr. Kretsinger.

EXHIBIT II.

The following is a copy of the testimony of the witnesses applicable to the "powder line workers" taken from the appellants' typewritten record, from which has been deleted all testimony not applicable to the "powder line workers."

ORVILLE A. GAINES, called as a witness on behalf of plaintiffs in Case No. 133, testified as follows on cross-examination: The plant had one bad explosion during the time he worked there and ten or twelve workers were injured or killed.

He was employed as a Line Safety Inspector at Q. O. Ordnance Plant from January, 1943, to April, 1945. As a line safety inspector he had to watch for fire, danger to personnel, danger to property, and to insure that safety procedures, such as use of non-sparking shoes, and respirators because the powder was toxic poison and would get in their lungs. Such clothing procedure was also for the benefit of the plant in that it insured that no sparking articles, buttons or nails were brought in proximity with powder or TNT.

MARIE TOFT, called as a witness on behalf of the plaintiffs in Case No. 111, testified as follows: She was employed by Q. O. Ordnance plant as a guard matron December, 1942, to August, 1945. She corroborated the other

guards' testimony as to guard mount and procedure relating to getting to and from posts.

The witness testified that a guard or matron in a change house was required to inspect line workers going on duty to make certain they changed from street clothes to powder clothes, that the women had no bobby pins in their hair or too much make-up on to which gun powder could cling. These line workers would get into the powder side of the change house, first putting on their uniforms and their special shoes and then go to their place on the line. No metal, matches or cigarettes were allowed on the line, nothing that was conducive to sparking to insure the greatest protection to the plant. After completing a shift employees were required to shower to get rid of any excess gunpowder adhering to them; otherwise gunpowder would cause their hair to turn red and infected their skin.

In response to the Court's questioning, the witness testified as follows (T. 196-197):

(By Mr. Lanigan)

Q. I notice many people have worked out there, women and men, whose hair turned red and their bodies broke out. Was that from the powder?

Mr. Eisenstatt: I object to that question as calling for a conclusion of the witness.

By the Court: If she knows anything about it I am inclined to inquire what it is they were guarding.

Mr. Eisenstatt: I don't mind him asking her if she saw this, but I—

By the Court: Did you notice this condition Mr. Lanigan has inquired about?

The Witness: Turning of hair red?

By the Court: Yes, and affecting the skin?

The Witness: There were some.

By the Court: Is that one of the things you were trying to protect?

The Witness: That is it. We tried to cover them, to have them wear uniforms for.

By the Court: The company was concerned, I take it, about the general health and welfare of the employees out there?

The Witness: I think so.

By the Court: They took every precaution they could?

The Witness: Yes.

By the Court: Was this one of the precautions?

The Witness: That we tried to prevent.

By the Court: That is one of the precautions they took to watch and protect them against?

The Witness: Yes.

By the Court: That was along the line of your duty?

The Witness: Yes.

Mary Keister, called as a witness on behalf of the plaintiffs in Case No. 111, testified as follows: She was employed by Q. O. Ordnance plant as a matron from October, 1942, to October, 1943, and that her activities and duties paralleled that of Witness Toft.

On cross-examination the witness testified that she had worked as a production inspector on the line for 6 or 7 months. She wore, as did others on the line, powder clothing, consisting of coveralls, bandanna handkerchief on her head and safety shoes, that would not spark. Even the coveralls had rubber buttons to eliminate sparking. This type of uniform was worn to protect the plant against sparks which would cause an explosion and also to protect the worker against powder contamination. She, as

all the others on the line, was required to shower at the end of the shift to rinse off the powder adhering to her hair and skin. There were eighteen buildings on each line and with the exception of the first two buildings which were primarily warehouses for casings, all of the buildings contained either explosive operations or fuses or ignitable substances.

FRED HATTON, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed by Q. O. Ordnance Plant from July, 1943, to September, 1945.

He testified that it took approximately one hour from the time he passed through the outside gate until he got to his duty post; that he first went to the line house, then to the change house and then to the chief inspector's office for orders. He would check in at least 5 minutes early to be sure to be at his post when the new shift came on. After being relieved from his shift he was required to shower and change clothes.

On cross-examination the witness testified that they were allowed 30 minutes for lunch. There were 18 buildings on each of the 3 production lines. He had worked in all 18 buildings on Lines 1 and 3. The first three buildings were for inert materials and the explosive filling operations were carried on in the other 15 buildings. Exhibit No. 7, being a list of production line inspectors, was identified by the witness as a list of inspectors in the complaint, and was offered in evidence.

MAX E. MOSES, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed as a line inspector by Q. O. Ordnance plant from September, 1944, to September, 1945. He substantiated Witness Hatton's testimony regarding the time s[illegible] getting to and from the shift, and taking showers. Exhibit

8, being a list of production line inspectors, was identified by the witness as a list of inspectors in the complaint, and was offered as evidence.

On cross-examination the witness testified that lunch time was staggered, half of the shift going first and then the other half of the shift going. Lunch time was 30 minutes.

Ferris Duke, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed by Q. O. Ordnance plant as a line operator during 1942 and 1943. He corroborated testimony of Witnesses Hatton and Moses regarding amount of time to get from main gate to post on the line and out again.

Roy C. Strait, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed by Q. O. Ordnance plant as a line operator from November, 1943, to February, 1945. He corroborated the testimony of Witnesses Hatton, Moses, and Duke regarding the time in and time out on the job, wearing of safety uniforms, and the performance of line operator activities including showering at the end of the shift.

On cross-examination the witness testified that he worked on Line 1 the entire time he was employed at the plant. Lunch time was 30 minutes.

Clifford H. Cooper, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed by Quaker Oats Company in Chicago and obtained a leave of absence in April, 1942, to come to Grand Island as division chief in charge of payroll and timekeeping. During his tenure, the plant had about 4000 employees, 700 per shift being line workers, 300 being the guard force, 200 being the firemen, 400 being administra-

tion personnel, 70 or 80 being inspectors. The lines were set up on an 8-hour 3-shift basis, from midnight to 8:00 A. M., 8:00 A. M. to 4:00 P. M., and from 4:00 P.M. to midnight. Line workers were paid for 8 hours per shift unless their time cards indicated overtime or docked time. Nothing on the time cards indicated the length of the lunch period. When the witness was at the plant the time clocks were located at the gate house and the workers clocked in there and then went to the change house. The clocks were subsequently moved to the change house and the workers had to change into their powder uniforms before clocking in. He did not know if dressing out and shower time was included in the clock-in and clock-out time. He stated that if the plant was paying for lunch period, then they were not paying anything for uniform changing and showering at the beginning and ending of the shift. Exhibit No. 15, being time cards of a guard, James McMonamon, were examined by the witness. He stated that a guard at that time was being paid for 8½ hours of work even though the time card showed check-in time of 2:22 P. M. and check-out time of 11:33 P. M., a total time of 9 hours 11 minutes. Exhibits 15A to 15D, inclusive, were offered in evidence.

To receive overtime a time card had to be initialed by the worker's supervisor. He stated that guards had no lunch period but subsequently were paid for 8¾ hours. Guards were paid for drill time but not for the ½ hour waiting time between the end of their shift and the beginning of drill. He admitted that during this ½ hour the guards could not remove their uniforms, could not clock out or leave the headquarters area.

On cross-examination the witness testified that time cards were used generally to record the fact that a worker was on his shift for the designated period and not as a basis for paying all the time recorded on the card. If the time card showed nothing to the contrary, the worker was paid for his shift time. If it was initialed by a supervisor, the worker was paid for the overtime so approved.

WILLIAM T. GORTON, called as a witness on behalf of the plaintiffs in Case No. 133, testified as follows: He was employed at Q. O. Ordnance plant as chief inspector of ammunitions and later as general superintendent of operations from March, 1941, to September, 1943.

At the start of operations, the time clocks for line operators were in the guard posts where the guards inspected personnel that came through the gates. Later the time clocks were moved to inside the change house, and still later to the ramp between the change house and the line. When the clocks were in the guard post a worker would time in and then go to the change house and change to his or her uniform which was specifically designed to protect the worker against the poisons of the powder. Almost all of the line workers were required to wear uniforms. Then the workers would go to their respective jobs on the different lines which were each approximately one mile long.

Paid lunch time was split up into 2 parts, so at least a portion of the workers was on the line at all times. 45 minutes was allowed for lunch and the cafeterias, 2 to each line, were located in the basement of each change house.

At the end of a shift, a worker would go to the change house, remove the soiled powder clothes, shower, put on street clothes and check out. When the time clocks were moved into the change house the worker checked in after donning powder clothes and checked out before removing powder clothes. Later the time clocks were moved to the ramp to help avoid congestion. As to the time taken by the activities of checking in and out and of dressing, undressing and showering, the witness testified as follows (T. 462-463):

Q. Is it your idea the defendant paid these line workers for the 45 minutes they spent for lunch in the cafeteria?

A. Yes, they were paid for it.

Q. Then after the clocks were moved down to the change house and then down to the ramp, there was no amount paid for dressing and undressing and showering time of the line workers; am I correct in that?

A. I don't believe they were.

Q. Whatever time was taken up in that operation, if you are correct, this is not compensated for at all?

A. No, sir.

Q. Would that amount to as much as 45 minutes a day both boing in and going out?

A. I think so.

The only buildings at which workers were not required to wear power clothes were in the inert building and the finished ammunitions building. Only a few employees worked in these two buildings and the bulk of the line workers worked in the buildings where powder was handled. The plant furnished powder clothing but the worker purchased his safety shoes from the company.

On cross-examination the witness testified that the first bomb was produced on November 11, 1942. The powder uniforms were of denim with rubber buttons. Men wore caps and women wore bandannas. The powder shoes had no nails or metal in them. Exhibit No. 16, being a diagram of the bomb loading line, was identified by the witness, and offered in evidence.

Defendant's Evidence.

Charles E. Kretsinger, called as a witness on behalf of defendant in Case No. 133, testified as follows: He was a line superintendent for Q. O. Ordnance Plant. In response to questioning on direct examination regarding the mandatory use of powder uniforms, the witness testified as follows (T. 658-659):

Q. On the line there was a department known as The Inert Department; then there was a department involving powder, and then there was a division involving the handling of the seal after the powder was poured?

A. That is right.

Q. Is that roughly about right?

A. Yes.

Q. And there were three shifts during most of the time out there?

A. Yes.

Q. And these shifts were from 8:00 to 4:00, and then on?

A. 8:00 to 4:00; 4:00 to 12:00; and then 12:00 to 8:00.

Q. And the line operators were paid for those shifts?

A. For their work shift.

Q. For their work shift?

A. Yes.

Q. I will lead a little again. The Company provided in the dressing house powder uniforms consisting of cotton underwear and socks and outer garments that did not have any metal buttons, for the use of the employees?

A. That is right.

Q. And similar equipment for the women?

A. Yes.

Q. Am I right in saying that those that worked with powder on this line were required to put on those garments before working?

A. It was mandatory that the explosive operator bathe and change into powder uniforms.

All this was for protection of the plant against explosives and for protection of the workers against powder

infections. The line operators were allowed 45 minutes for lunch and were required to eat and to smoke in the cafeteria provided. It would take about 30 minutes for a worker to come in to the change room, don powder clothes, time in and go to his place on the line. The reverse process, including a shower, took about the same length of time.

Defendant rested both cases.

FILED
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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 486.

JOSEPH P. DUNNING, ERNEST BINGHAM, O. A. GAINES, JOHN H. SIEVERS ET AL., INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND ON BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,

Petitioners,

vs.

THE Q. O. ORDNANCE CORPORATION.

REPLY BRIEF OF PETITIONERS.

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STATUTE

Rule 52 of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 52) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 486.

JOSEPH P. DUNNING, ERNEST BINGHAM, O. A. GAINES, JOHN H. SIEVERS ET AL., INDIVIDUALLY AND AS AGENTS AND REPRESENTATIVES TO MAINTAIN THIS ACTION FOR AND ON BEHALF OF ALL EMPLOYEES SIMILARLY SITUATED,
Petitioners,

vs.

THE Q. O. ORDNANCE CORPORATION.

REPLY BRIEF OF PETITIONERS.

To the Honorable The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Petitioners desire to reply to several points raised by respondent in its "Brief for Respondent in Opposition."

Reference to the Petition for Writ of Certiorari is referred to as (Pet. .....) and to Respondent's Brief as (Resp. .....).

REPLY TO QUESTION PRESENTED.

In its "Question Presented" respondent quotes two findings made by the trial court that powder line operators and inspectors engaged in no activity without receiving compensation therefor, and states that the issue is whether such findings were clearly erroneous under Rule 52 of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 52). The trial court further found that:

> "The explosive operators, who worked in buildings in the center portion of the line where the explosives were melted, poured and processed, were required to wear powder clothes and take a shower at the end of the shift * * *" (Pet. App. A. 12).

Petitioners (all explosive operators and inspectors) state that within the confines of the above finding lies the only issue in this case. Were such activities an integral part of petitioners' principal activities for which they are to recover compensation therefor under the Fair Labor Standards Act, without meeting the requirements of Section 2 of the Portal-to-Portal Act?

Petitioners state that this is a clear cut question of law concerning which this court remains free to draw from the findings the ultimate inferences and conclusions, unfettered by the "clearly erroneous" rule of Federal Rule 52, *Walling* v. *Nashville, C. & St. L. Ry.*, (6 Cir.) 155 F. 2d 1016, 1018.

The Question Is Primarily One of Law.

The trial court's decision and Judge Sanborn's decision was not, as respondent would have the court believe, a question of dispute of facts, but actually a misconception of the applicable law. In view of the trial

court's assumption that such activities automatically fall into the preliminary and postliminary classification and Judge Sanborn's assumption that the compensability of such activities necessitates the proving of a contract, custom or practice, it could well be said that these conclusions on this point were "entered on a misconception of the applicable law," *Anderson* v. *Federal Cartridge Corporation*, (C. C. A. 8) 156 F. 2d 681, 684; *Steiner* v. *Mitchell*, 350 U. S. 247; *Mitchell* v. *King Packing Company*, 350 U. S. 260.

REPLY TO RESPONDENT'S STATEMENT.

Respondent confusedly states that there is little or no evidence establishing that it was mandatory and necessary to wear respirators and powder clothing, and to take showers at the end of the shift period and that the explosives were hazardous to the health of the workers and inimicable to the safety of the plant. Such statements are completely refuted by the testimony contained in the exhibits to respondent's brief, as follows:

Respirators were required because the powder was toxic poison and would get in their lungs (Resp. p. 35);

The powder clothes consisted of cotton underwear, denim coveralls with rubber buttons to prevent sparking, caps or bandana handkerchiefs, and safety shoes having no nails or metal in them (Resp. pp. 27, 32. 34, 36, 37, 41, 42);

It was mandatory for powder line operators to wear respirators and safety powder clothes (Resp. pp. 32, 35, 41, 42, 43);

The uniforms and respirators were worn by the powder line workers to protect the plant against sparks

which would cause an explosion and also to protect the workers against a toxic powder contamination which was dangerous to the lungs and skin and would cause the hair to turn red (Resp. pp. 27, 32, 35, 36, 37, 41, 43);

The plant had one bad explosion during operations by respondent in which ten or twelve workers were injured or killed (Resp. p. 35);

It was mandatory that powder line workers take a shower at the end of the shift to wash off the powder adhering to their skin and hair to further prevent powder contamination (Resp. pp. 25, 36, 38, 43).

These facts were so conclusive that they were quoted verbatim by Judge Collet in 228 F. 2d 929, and reaffirmed by Judge Sanborn in 233 F. 2d 902. There is no justiciable controversy as to these facts. On the basis of the above facts Judges Collet and Sanborn, stated:

> "The powder line workers who engaged in melting, pouring and processing explosives were required to change their clothes and take a shower after their shift. They were required to change their clothes as a safety precaution against explosions which might be caused from sparks from metallic objects on or in conventional clothing. They were required to take a shower as a safety measure for the employee's own health to avoid after effects of powder remaining on the person of the employee" (Pet. A. 20, 27).

The facts and findings above should also summarily dispose of respondent's astounding contention (Resp. 20, 21) that employment in an ammunition plant to handle powder and molten TNT was less hazardous to the health and safety of its employees than employment in a battery plant, *i. e.* the *Steiner* case, *supra.*

REPLY TO RESPONDENT'S ARGUMENT.

The Decision Below Is Clearly Erroneous.

Respondent erroneously states that the trial court found "that the activities for which compensation is claimed in this petition were not the principal activities nor an integral part of the activities for which the plaintiffs (petitioners) were hired." (Resp. 7). The trial court actually held as follows:

> "* * * The evidence fails to convince the court that the employees ever engaged in the day's principal activities without receiving compensation therefor and there was no contract, custom or practice to pay the employees for preliminary activities engaged in before, or postliminary activities engaged in after, the shift period." (Pet. A. 13).

The trial court never considered the question whether or not these activities constituted an integral part of the principal activities; throughout its opinion the trial court erroneously treated the clothes changing and showering activities as Section 4 preliminary and postliminary activities. However, assuming that the trial court found as respondent suggests, it still erred in the same manner as the trial court and the Court of Appeals for the Ninth Circuit erred in the *Mitchell* v. *King Packing Co.* case, 107 Fed. Supp. 369, 216 F. 2d 618, reversed 350 U. S. 260. That is, the trial court erred in failing to find that the undisputed set of facts which he found to exist fell within the "integral and indispensable" definition; which error, in this respect, should cause a reversal in this case as the Supreme Court reversed the findings in the King Packing case.

The Decision Below Conflicts with the Court's Prior Opinion, the Eighth Circuit's Settled Law and the Law of a Majority of the Other Circuits.

At the bottom of Page 8, of its opposition brief the respondent argues that "there is no conflict of decisions among the court of appeals." At the top of Page 12 the Respondent argues "There has been no change in the position of the Eighth Circuit. Its decision in this case accords entirely with its prior rulings."

As Judge Collet aptly and correctly stated (228 F. 2d 929) if the activities were integral it was unnecessary to prove "a special contract under which they were to be compensated for these periods." (Pet. A. 19). Judge Sanborn in the second opinion (233 F. 2d 902) abandoned the prior law of the Eighth Circuit and flatly stated that Section 2 of the Portal to Portal Act precluded recovery of such activities absent proof of a contract custom or practice (Pet. A. 31, 32).

As we pointed out in the Petition for Certiorari, the trial court overlooked and Judge Sanborn in his opinion overlooked the following decisions which reached the same result but ~~was~~ with slightly different reasoning, held that:

1. If the activities are an integral part of the principal activities, a special contract need not be proven. *Central Missouri Telephone Co.* v. *Conwell,* (C. C. A. 8) 170 F. 2d 641; *Martin-Nebraska Co.* v. *Culkin,* (C. C. A. 8) 197 F. 2d 981, Judge Collet in prior opinion, (C. C. A. 8) 228 F. 2d 929; *Joshua Hendy Corporation* v. *Mills,* (C. C. A. 9) 169 F. 2d 898; *Glenn* v. *Southern Cal. Edison, Ltd.,* (C. C. A. 9) 187 F. 2d 318; *Biggs* v. *Joshua Hendy Corp.,* (C. C. A. 9) 183 F. 2d 515; *F. W. Stock & Son* v. *Thompson,* (C. C. A. 6) 194 F. 2d 493, or

2. If the contract of employment required the activities, the burden of proving a contract has been met. *United States Steel* v. *Burkett*, (C. C. A. 4) 192 F. 2d 489; *Marchant* v. *Sands Taylor & Wood Co.*, (in First Circuit) 75 Fed. Supp. 783 (Dist. Ct. of Mass.); *Campbell* v. *Jones & Laughlin Steel Corp.*, (in Third Circuit) 96 Fed. Supp. 189 (Dist. Ct. of Pa.).

Respondent apparently agrees with petitioners on both of these propositions. Respondent states:

> "The petitioners had the burden of proof at the trial to prove:
>
> (a) that the activities for which Compensation is claimed were work as defined by the Fair Labor Standards Act, and,
>
> (b) that such activities were compensable by contract, custom or practice as required by the Portal to Portal Act of 1947, *or* (emphasis ours),
>
> (c) that the activities were an integral part of the work performed or were a principal part thereof." (Resp. 9, 10).

Petitioners agree that this is a correct statement of the law and state that the burden of proof was unquestionably sustained as to (a) and (c). This statement of the law is exactly as Judge Collet stated in the first opinion in this case (Pet. A. 19). Respondent agrees with Judge Collet's statement of the law (Resp. p. 10). On the other hand Judge Sanborn did not recognize that the petitioners had the choice of proving either (b) or (c) but held that petitioners had to fulfill the requirements of (b) and would not have the alternative of proving (c). In this regard Judge Collet's and Judge Sanborn's statements of the law are diametrically opposed, as are those of the other circuits to this holding of Judge Sanborn.

Judge Sanborn in his opinion overlooked both of these propositions, but respondent agrees with both of them. Respondent states that if the activities were an integral part of the work performed it need not be proven that the activities were compensable by contract, custom or practice (Resp. p. 10).

On the latter of the two propositions, the respondent quotes at length from the *Burkett* case, *supra,* in which the employees engaged in 40 minutes of preshift and post shift activities. The quoted portion of the opinion pointed out that the employers were engaged in work which they were "expected by their superiors to do," "a necessary incident" to the work; a part of the work the employees were "specifically required to do by the terms of their employment," "were required by specific orders," "were expected to do." (Resp. p. 17). The respondent, in discussing this opinion says "These men were employed to do certain supervisory activities during a particular shift time and then were *required* to spend an additional 40 minutes a day doing the very same things *prior to the scheduled shift* and *after the scheduled shift.* THE COURT RIGHTLY FOUND THAT THE PORTAL ACT HAD NO APPLICATION." (Resp. p. 17) (Emphasis ours). Respondent obviously agrees that if the contract of employment requires certain activity the Portal Act has no application.

Incidental Clothes Changing Is Not Involved in This Case.

The respondent then goes on to argue that the activities in the *Seese* v. *Bethlehem Steel* case, (C. C. A. 4) 168 F. 2d 58, were more comparable to the case at bar than the *Burkett* case. But this court can certainly see that the "incidental activities" referred to as the type of activities sought to be eliminated by the Portal Act are quite differ-

ent than integral and indispensable activities of the type and nature found in the Steiner case and in the case at bar. True, changing of clothes can be "incidental" rather than "integral": *McComb* v. *C. A. Swanson & Sons*, 77 Fed. Supp. 716; *Mitchell* v. *Southeastern Carbon Paper Co.*, (C. C. A. 5) 228 Fed. 934. However, as this court pointed out in the *Steiner* and *King* opinions, under certain circumstances changing of clothes must be "integral and indispensable" as in the case at bar.

The Trial Court Did Not Have the Benefit of the Steiner and King Decisions.

One statement of the Respondent at the middle of Page 19 of the opposition brief should be called to this court's attention because it is illustrative of the broad and inaccurate nature of so many of the statements made in the opposition brief. The respondent said the "trial court and the appeal court both distinguished the case at bar from these other decisions (the Steiner and King decisions)." It should be significant to say that the *Steiner* and *King* decisions were not on the books at the time the trial court rendered its decision and for this reason they were neither discussed nor distinguished by the trial court. Contrary to respondent's statement, when they were called to his attention he readily recognized his error and ordered the appeal *in forma pauperis*.

An Important Question of Federal Law Is Involved.

Respondent's broad statement that there is no important question of federal law involved is not of much aid to the court. The evident oversight of applicable law and the resulting conflict which now exists should cause this court to readily issue its writ.

CONCLUSION.

On the basis of the arguments and the matters contained in the Petition for Certiorari and the fallacies in the respondent's opposition brief which are herein pointed out, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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